

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 184

THE STANDARD OIL COMPANY, AN OHIO
CORPORATION, APPELLANT,

vs.

JOHN W. PECK, TAX COMMISSIONER, STATE OF
OHIO, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED JULY 9, 1951.

PROBABLE JURISDICTION NOTED OCTOBER 8, 1951.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 184

THE STANDARD OIL COMPANY, AN OHIO
CORPORATION, APPELLANT,

vs.

JOHN W. PECK, TAX COMMISSIONER, STATE OF
OHIO, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

INDEX

	Original	Print
Proceedings in Supreme Court of Ohio	1	1
Petition for appeal	1	1
Order allowing appeal	3	2
Assignment of errors and prayer for reversal	5	3
Proofs of service of appeal papers	94	4
Notices to appellees, required by Rule 12	97	5
Præcipe for transcript of record	101	7
Docket and journal entries	114	9
Judgment	118	11
Order of substitution	118	12
Notice of appeal	120	13
Decision of Board of Tax Appeals	122	13
Concurring memorandum	163	39
Proceedings before the Board of Tax Appeals	198	45
Notice of appeal, (Personal property tax assessment for 1945)	198	45
Exhibit "A"—Order of the Tax Commissioner	202	47
Amendment and supplement to notice of appeal	207	51

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 9, 1951.

Proceedings before the Board of Tax Appeals—Continued

	Original	Print
Notice of appeal (Personal property tax assessment for 1946)	208	52
Exhibit "A"—Order of the Tax Commissioner	211	54
Amendment and supplement to notice of appeal	217	58
Proceedings and testimony	226	59
Appearances	226	59
Agreement re Consolidation of cases	228	60
Excerpts from opening statement by Mr. Day	228	60
Testimony of Henry William Pattison	241	65
Testimony of William N. Kall	270	89
Proceedings before the Tax Commissioner	575	93
Findings of the Tax Commissioner, No. 3327	575	93
Findings of the Tax Commissioner, No. 3276	644	97
Appellant's exhibit "1" before Board of Tax Appeals—Map showing The Standard Oil Co. (Ohio) and subsidiary companies. Transportation Operations	650	102
Appellant's exhibit "2" before Board of Tax Appeals. Chart showing Statement of Sohio Petroleum Company—Crude Oil River operations—Owned boats only 1944-1945-1946	651	102
Opinion, Matthias, J.	738	103
Concurring opinion, Taft, J.	760	122
Certificate as to the Court's intent to hold Sections 5328 and 5325 General Code of Ohio to be valid and not repugnant to the Fourteenth Amendment of the Constitution of the United States	761	123
Application for substitution of appellees	766	124
Notice of application	767	125
Clerk's certificate (omitted in printing)	769	
Statement of points to be relied upon and designation of parts of record to be printed	771	125
Order noting probable jurisdiction	774	128

[fol. 1] - **IN THE SUPREME COURT OF OHIO**

No. 32,060

THE STANDARD OIL COMPANY, an Ohio Corporation,
Appellant,

vs.

**JOHN W. PECK, Tax Commissioner of Ohio (Substituted for
 C. Emory Glander, Former Tax Commissioner of Ohio),
 and John J. Carney, Auditor of Cuyahoga County (Sub-
 stituted for John A. Zangerle, Former Auditor of Cuya-
 hoga County), Appellees**

**PETITION FOR APPEAL FROM THE SUPREME COURT OF OHIO—
 Filed June 7, 1951**

**To the Honorable Carl V. Weygandt, Chief Justice of the
 Supreme Court of Ohio:**

Now comes The Standard Oil Company, the above named
 appellant, by McAfee, Grossman, Taplin, Hanning, New-
 comer & Hazlett, of Cleveland, Ohio, its attorneys, and al-
 leges that it is a corporation duly organized and existing
 under the laws of the State of Ohio, having its principal
 office and place of business in the City of Cleveland, Ohio;
 that in the above entitled cause, the Supreme Court of the
 State of Ohio rendered an opinion, decision and final judg-
 ment on the 14th day of March, 1951.

Appellant has with this petition filed with the Clerk of
 said Supreme Court an assignment of errors setting forth
 [fol. 2] separately and particularly each error of the Su-
 preme Court in said cause complained of by appellant, and
 also a separate statement particularly disclosing the basis
 upon which appellant contends that the Supreme Court of
 the United States has jurisdiction upon appeal to review the
 judgment in question.

Wherefore, your petitioner prays the allowance of an
 appeal from said judgment of the Supreme Court of the
 State of Ohio to the Supreme Court of the United States, to
 the end that the record in said matter may be removed into
 the said Supreme Court of the United States and the errors

complained of by your petitioner may be examined and corrected and said judgment reversed and a judgment rendered in favor of the appellant on the issues as to which error has been assigned, and for costs.

The Standard Oil Company, by McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett, Its Attorneys.

Isador Grossman, Rufus S. Day, Jr., H. V. E. Mitchell, of Counsel.

[File endorsement omitted.]

[fol. 3] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 7, 1951

The appellant in the above entitled cause having prayed for the allowance of an appeal to the Supreme Court of the United States from the final judgment rendered therein by the Supreme Court of Ohio on the 14th day of March, 1951, and having presented and filed with this Court its Petition for Appeal, Assignment of Errors and Prayer for Reversal, and Statement of Jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is hereby ordered that the said appeal be and the same is hereby allowed as prayed for, and that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Clerk of the Supreme Court of [fol. 4] the United States so that he shall have the same in said Court within forty days from the date hereof.

It is further ordered that security for costs on appeal be fixed at the sum of \$500.00, and that upon approval of bond in said amount this order shall operate as a supersedeas.

Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio. 6/7/51.

Dated at Columbus, Ohio this 7th day of June, 1951.

[fol. 5]

IN THE SUPREME COURT OF OHIO

{Title omitted}

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed
June 7, 1951

The Standard Oil Company, appellant herein, alleges that the Supreme Court of Ohio, in connection with this cause, erred in the following respects:

1. In holding that Ohio, the domiciliary state of appellant, on the facts disclosed by the record, had jurisdiction to tax appellant's boats and barges, at their full value and without apportionment, for Ohio Personal Property Tax purposes for the years 1945 and 1946, although these boats and barges were used solely and regularly in navigating the Mississippi and Ohio Rivers from points in Louisiana or Tennessee to points in Indiana or Kentucky, and only 1.27% of such navigation was in waters which bordered on Ohio;

[fols. 6-93] 2. In failing to hold that Sections 5328 and 5325 of the General Code of Ohio, which it construed to require the taxation of appellant's boats and barges, at their full value and without apportionment, for Ohio Personal Property Tax purposes for 1945 and 1946, were violative of and repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States; and

3. In affirming the judgment of the Ohio Board of Tax Appeals sustaining the assessments made by the Tax Commissioner of Ohio of appellant's boats and barges for Ohio Personal Property Tax purposes for 1945 and 1946, and in not reversing and setting aside such assessments on the ground that the assessments and the statutes authorizing them were violative of and repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, The Standard Oil Company, appellant herein, prays that the said judgment of the Supreme Court of the State of Ohio, which judgment was rendered and became final March 14, 1951, be reversed insofar as it re-

4
lates to the taxation of appellant's boats and barges, and that judgment be rendered in favor of the appellant herein on said issue and for costs.

The Standard Oil Company, by McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett, Its Attorneys.

Isador Grossman, Rufus S. Day, Jr., H. V. E. Mitchell, of Counsel.

[File endorsement omitted.]

[fols. 94-95] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

PROOF OF SERVICE—Filed June 7, 1951

Service upon the undersigned is hereby acknowledged of the following documents filed in the above entitled cause, to-wit:

- (1) Petition for appeal from the Supreme Court of Ohio;
- (2) Assignment of errors;
- (3) Statement in support of jurisdiction;
- (4) Order allowing appeal;
- (5) Certificate as to federal question involved;
- (6) Citations to appellees;
- (7) Notice to appellees pursuant to Rule 12(3) of the Rules of the Supreme Court of the United States;
- (8) Precipe for transcript of record.

Witness, the undersigned this 7th day of June, 1951.

John W. Peck, Tax Commissioner of Ohio, by C. William O'Neill, Attorney General, State of Ohio, Robert E. Leach, Assistant Attorney General, State of Ohio.

[fol. 96]

[File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

PROOF OF SERVICE—Filed June 12, 1951

Service upon the undersigned is hereby acknowledged of the following documents filed in the above entitled cause, to-wit:

- (1) Petition for appeal from the Supreme Court of Ohio;
- (2) Assignment of errors;
- (3) Statement in support of jurisdiction;
- (4) Order allowing appeal;
- (5) Certificate as to federal question involved;
- (6) Citations to appellees;
- (7) Notice to appellees pursuant to Rule 12(3) of the Rules of the Supreme Court of the United States;
- (8) Praecipe for transcript of record.

Witness, the undersigned this 11th day of June, 1951.

John J. Carney, Auditor of Cuyahoga County, Ohio,
by L. B. Mitchell, Chief Deputy.

[fol. 97]

[File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

NOTICE TO APPELLEE—Filed June 12, 1951

Notice is hereby given to John J. Carney, Auditor of Cuyahoga County, appellee in the above styled cause, that an appeal was allowed in said cause by the Honorable Carl V. Weygandt, Chief Justice, Supreme Court of Ohio, on June 7, 1951, and the attention of the appellee is hereby called to paragraph 3 of Rule 12 of the Supreme Court of the United States, which is as follows:

“Within 15 days after such service the appellee may file with the clerk of the court possessed of the record,

and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3."

McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett.

Service of the foregoing notice is hereby acknowledged this 11th day of June, 1951.

John J. Carney, Co. Auditor, by L. B. Mitchell,
Deputy.

[fols: 98-100] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

NOTICE TO APPELLEE—Filed June 7, 1951

Notice is hereby given to John W. Peck, Tax Commissioner, State of Ohio, appellee in the above styled cause, that an appeal was allowed in said cause by the Honorable Carl V. Weygandt, Chief Justice, Supreme Court of Ohio, on June 7, 1951, and the attention of the appellee is hereby called to paragraph 3 of Rule 12 of the Supreme Court of the United States, which is as follows:

"Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3."

McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett.

Service of the foregoing notice is hereby acknowledged this 7th day of June, 1951.

C. William O'Neil, Attorney General; Robert E. Leach, Asst. Attorney General, Attorneys for John W. Peck, Tax Commissioner of Ohio.

[fol. 101] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed Jun 12, 1951

To the Clerk of the Supreme Court of Ohio:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal in the above styled cause, and to include in this transcript of record the following papers and documents, to-wit:

1. Transcript of docket and journal entries in this cause in its entirety;

2. Printed record in this cause in its entirety (2 vols.);

3. Opinion of the Tax Commission of the State of Ohio for the years 1945 and 1946 in this case;

4. Opinion and entry of the Board of Tax Appeals in this cause filed November 19, 1949 and opinion and entry of December 15, 1949 upon appellant's application for rehearing;

[fol. 102] 5. Notice of Appeal to the Supreme Court of Ohio from the Board of Tax Appeals' decision in this cause filed by appellant herein;

6. Assignment of errors filed by appellant in the Supreme Court of Ohio from decision and order of the Board of Tax Appeals in this cause;

7. Opinion and decision of the Supreme Court of Ohio rendered in this cause on March 14, 1951;

8. Petition for appeal to the Supreme Court of the United States filed by appellant herein;

9. Statement in support of jurisdiction of the Supreme Court of the United States;

10. Order of the Chief Justice of the Ohio Supreme Court allowing appeal to the Supreme Court of the United States;

11. Assignment of errors with respect to the decision and judgment of the Supreme Court of Ohio in this cause, filed by appellant herein;

12. Citation on appeal to John W. Peck, Tax Commissioner of the State of Ohio, signed by the Chief Justice of the Supreme Court of Ohio; Citation on appeal to John J. Carney, Auditor of Cuyahoga County, Ohio, signed by the Chief Justice of the Supreme Court of Ohio;

13. Certificate as to federal question involved signed by the Chief Justice of the Supreme Court of Ohio;

14. Notice of appeal pursuant to Rule 12(3) of Rules of The United States Supreme Court, addressed to John W. Peck, Tax Commissioner of the State of Ohio, and John J. Carney, Auditor of Cuyahoga County;

[fols. 103-105] 15. The bond for costs of appeal and approval thereof;

16. This precipe with acknowledgment and waiver of counter precipe;

17. Proof of service of appeal papers.

Said transcript to be prepared as required by law and the rules of this court and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 17th day of July, 1951.

McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett, Attorneys for Appellant.

[fols. 106-113] Service of the foregoing precipe upon the undersigned is hereby acknowledged and right of filing counter precipe is hereby waived, this 7th day of June, 1951.

C. William O'Neill, Attorney General; Robert E. Leach, Ass't Attorney General, Attorneys for John W. Peck, Tax Commissioner of Ohio.

[fol. 114] THE SUPREME COURT OF OHIO

DOCKET AND JOURNAL ENTRIES

Dec. 19, 1949. Notice of Appeal and proof of service filed.

Jan. 17, 1950. Transcript of record, abstract of docket of Board of Tax Appeals (7 Vols. in all) filed.

Jan. 17, 1950. Papers sent to Gates. 5/4/50 returned.

Feb. 13, 1950. Application for extension of time to file printed record and appellant's brief filed.

Feb. 13, 1950. Entry extending time for filing printed record and Appellant's brief to April 1, 1950. William L. Hart, J., J. 39-351.

Feb. 17, 1950. Supplemental transcript of record filed. 5/4/50 returned.

Mar. 22, 1950. Application for extension of time to file printed record and appellant's brief and consent to granting of same filed.

[fol. 115] Mar. 22, 1950. Entry extending time for filing printed record and appellant's printed brief to May 15, 1950. Carl V. Weygandt, C. J., J. 39-385.

May 3, 1950. Printed record Vol. 1 and 2 and proof of service filed.

May 5, 1950. Application for an extension of time to file Appellant's brief, etc., filed.

May 5, 1950. Entry extending time for filing appellant's brief to June 15, 1950, Appellee's brief to September 1, 1950 and Appellant's reply brief to September 30, 1950. Carl V. Weygandt, C. J., J. 39-433.

June 12, 1950. Entry extending time for filing Appellant's printed brief to June 20, 1950. Carl V. Weygandt, C. J., J. 39-464.

June 24, 1950. Leave granted Appellant to file brief instant.

June 24, 1950. Appellant's printed brief and affidavit of service filed.

Sep. 1, 1950. Appellee's printed brief and affidavit of service filed. 9/6/50 proof of service filed.

Oct. 6, 1950. Entry extending time for filing Appellant's reply brief to Oct. 13, 1950. Carl V. Weygandt, C. J., J. 39-539.

Oct. 13, 1950. Appellant's printed reply brief and affidavit of service filed.

Mar. 14, 1951. Decision affirmed in part and reversed in part. J. 39-670.

Mar. 21, 1951. Mandate Issued.

May 22, 1951. Certificate of Supreme Court of Ohio as to Federal Constitutional question filed.

June 7, 1951. Application for substitution of appellees and proof of service filed.

June 7, 1951. Entry granting application for substitution of appellees approved. Carl V. Weygandt, C. J., J. 40-47.

June 7, 1951. Petition for appeal filed.

[fol. 116]. June 7, 1951. Order allowing appeal filed.

June 7, 1951. Assignment of errors and prayer for reversal filed.

June 7, 1951. Statement in support of jurisdiction filed.

June 7, 1951. Bond in sum of \$500.00 American Casualty Co. as surety approved and filed.

June 7, 1951. Notice to appellee, John W. Peck, Tax Commr. and proof of service filed.

June 7, 1951. Citation issued to John J. Carney, Auditor.

June 7, 1951. Citation to John W. Peck, Tax Commr. filed.

June 7, 1951. Proof of service of all papers on John W. Peck, Tax Commr. filed.

June 7, 1951. Precipe for transcript of record filed.

June 12, 1951. Citation returned and filed.

June 12, 1951. Notice to appellee, John J. Carney, Auditor and proof of service filed.

June 12, 1951. Proof of service of all papers on John J. Carney, Auditor filed.

June 19, 1951. Statement in opposition to appellant's statement in support of jurisdiction and appellee's motion to dismiss or affirm filed. 6/21/51 Proof of service filed.

[fol. 117]

JOURNAL ENTRIES

Entry.

Monday, February 13, 1950.

Upon application of appellant, and for good cause shown, it is ordered that the time for filing printed record and appellant's brief herein be, and the same hereby is extended to April 1, 1950. William L. Hart, Judge. J. 39-351.

Entry.

Wednesday, March 22, 1950.

Upon application of appellant, and for good cause shown, it is ordered that the time for filing printed record and appellant's printed brief herein be, and the same hereby is extended to May 15, 1950. Carl V. Weygandt, C. J. J. 39-385.

Entry.

Friday, May 5, 1950.

Upon application of counsel for both sides and for good cause shown, it is ordered that the time for filing appellant's brief herein be, and the same hereby is extended to June 15, 1950, appellees' brief to September 1, 1950 and appellant's reply brief to September 30, 1950. Carl V. Weygandt, Chief Justice. J. 39-433.

Entry.

Monday, June 12, 1950.

Upon application of appellant, and for good cause shown, it is ordered that the time for filing appellant's printed brief herein be, and the same hereby is extended to June 20, 1950. Carl V. Weygandt, Chief Justice. J. 39-464.

[fol. 118] Entry.

Friday, October 6, 1950.

Upon application of appellant, and for good cause shown, it is ordered that the time for filing appellant's printed reply brief herein be, and the same hereby is extended to October 13, 1950. Carl V. Weygandt, Chief Justice. J. 39-539.

APPEAL FROM THE BOARD OF TAX APPEALS

JUDGMENT

Wednesday, March 14, 1951.

This cause came on to be heard upon the transcript of the Record of the Board of Tax Appeals of Ohio and was argued by counsel. On consideration whereof, it is ordered

and adjudged by this court, that the decision of the said Board of Tax Appeals be and the same hereby is reversed insofar as its decision did not make proper allowance for obsolescence in the year 1946 and its refusal to grant the taxpayer proper reduction to book value for the year 1945.

It Is Further Ordered that the cause be, and the same hereby is, remanded to the Board of Tax Appeals for further proceedings in accordance with the opinion rendered herein.

Ordered, That a special mandate be sent to the Board of Tax Appeals of Ohio to carry this Judgment into Execution. J. 39-670.

ORDER FOR SUBSTITUTION OF APPELLEES

Thursday, June 7, 1951.

The Standard Oil Company, appellant in the above entitled cause, having filed with this court an application for substitution of appellees, and it appearing to the court that John W. Peck, is at present the holder of the Office of Tax Commissioner of the State of Ohio and that he is the successor in office to C. Emory Glander, former Tax Commissioner of the State of Ohio, appellee in the above entitled cause, and it appearing to the Court that John J. [fol. 119] Carney is at present the holder of the office of Auditor of Cuyahoga County, Ohio, and that he is the successor in office to John A. Zangerle, former Auditor of Cuyahoga County, appellee in the above entitled cause, and it further appearing to this court that the substitution of the present holders of the office of Tax Commissioner of the State of Ohio and the office of Auditor of Cuyahoga County, Ohio is desirable and proper, it is therefore, Ordered, Adjudged and Decreed that John W. Peck, Tax Commissioner of Ohio, be substituted as appellee in the above entitled cause for C. Emory Glander, former Tax Commissioner of Ohio, and that John J. Carney, Auditor of Cuyahoga County, Ohio, be substituted as appellee in the above entitled cause for John A. Zangerle, former Auditor of Cuyahoga County, Ohio. Carl V. Weygandt, Chief Justice. J. 40-47.

[fol. 120] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

NOTICE OF APPEAL—Filed December 19, 1949

[fol. 121]. The Standard Oil Company, Appellant herein, hereby gives notice of appeal to the Supreme Court of Ohio from a decision rendered by the Board of Tax Appeals, Department of Taxation of Ohio, on November 19, 1949, in consolidated cases Nos. 12488, 14381 and 14514 before it, said consolidated cases, and each of them, being entitled "The Standard Oil Company, an Ohio Corporation, Appellant, vs. C. Emory Giander, Tax Commissioner of Ohio, Appellee". A copy of said decision is set forth on the next succeeding pages of this notice of appeal.

[fol. 122] DECISION OF BOARD OF TAX APPEALS IN CONSOLIDATED CASES NOS. 12488, 14381 and 14514

These several causes and matters came on to be heard and considered by the Board of Tax Appeals on appeals heretofore filed by the appellant above named, an Ohio corporation, from final orders and tax assessments made by the tax commissioner on and with respect to certain tangible personal property of the appellant for the tax years 1943, 1944, 1945 and 1946, respectively. Case No. 12488 is an appeal filed herein from a final assessment certificate and amendment thereof assessing for the tax years 1943 and 1944, respectively, a Houdry catalytic cracking unit which was in process of construction on January 1, 1943, and on January 1, 1944, but which was unfinished and not yet in operation on each of said tax listing dates. Case No. 14381 is before the Board on two appeals, as amended, from final orders of the tax commissioner here in question for the tax years 1945 and 1946, respectively, [fol. 123] on certain towboats and barges of the appellant company, on the then finished and operating Houdry catalytic cracking unit, above referred to, and on certain machinery and equipment in process of construction which

was unfinished and not in operation on January 1, the tax listing day in each of said tax years. Case No. 14514 is an appeal from a final assessment certificate of the tax commissioner for the tax year 1945, which tax certificate was made and issued after the appeal for said tax year in case No. 14381 was filed herein; and aside from the question of the authority of the tax commissioner to make such final assessment, the issues presented in this appeal are the same as those noted in the appeal in case No. 14381, so far as the tax assessments in question for the year 1945 are concerned. These cases were heard and submitted to the Board on said several and respective appeals, on transcripts of the proceedings of the tax commissioner relating to the several tax assessments complained of, on evidence offered and introduced by the parties on a consolidated hearing of the cases before an examiner of the Board and on the briefs of counsel.

The first question presented to the Board on the hearing and submission of these cases is that presented in the appeals as amended for the tax years 1945 and 1946 in case No. 14381, with respect to the taxability of certain towboats and barges which were owned by the company on tax list-[fol. 124] ing day in said tax years, and which were used by it in the transportation of petroleum and petroleum products on the Mississippi and Ohio Rivers during the years 1944 and 1945. As to this it appears that the company listed these towboats and barges in the personal property tax returns which it made as an inter-county corporation for the tax years 1945 and 1946, respectively, and that the tax commissioner assessed these boats and barges on the basis of a true value of the same in the amount of \$1,322,863 for the tax year 1945 and on the basis of the true value of \$1,303,907 for the tax year 1946—the assessment in each case being on a list or assessed valuation of 70% of the determined true valuation. Of the boats and barges returned for taxation by the company in said tax years certain boats and barges having a true valuation of \$109,541 for the tax year 1945, and \$102,022 for the tax year 1946, were used by the company in transporting gasoline from the company's refinery at Latonia, Kentucky, to various Ohio River points in this state. No question is made in this case by the appellant with respect to the boats and

barges so used. The other boats and barges of the company, the taxability of which is a question at issue in this case, were used by the company for the transportation of crude oil from Gibson Landing in the state of Louisiana and from other points on the Mississippi River, up that [fol. 125] river and up the Ohio River to Mt. Vernon, Indiana, where the company had a pipe line terminal, and to Bromley, Kentucky, from which point crude oil was delivered for use at the company's refinery at Latonia, Kentucky.

These boats and barges in transporting crude oil to the company's pipe line terminal at Mt. Vernon, Indiana, did not, of course, reach that part of the waters of the Ohio River which border on the State of Ohio; while these same boats and barges in transporting crude oil to Bromley, Kentucky, a point across the river from Cincinnati, Ohio, traverse the waters bordering on this state for a distance of only $17\frac{1}{2}$ miles—the distance from the Ohio-Indiana line to Bromley. And, apparently, no part of the movement of these boats and barges is in waters within the territory of the State of Ohio—which territory extends only to low water mark on the Ohio side of the river—, unless it be on relatively infrequent occasions when empty boats nose into the dock at Cincinnati for minor repairs or for the purpose of taking on food supplies.

In this situation the appellant contends that these boats and barges were not taxable under the provisions of section 5328 and other related sections of the General Code, for the tax years here in question, for the stated reasons (1) that the navigation of the waters of the Ohio River bordering [fol. 126] on this state were so inconsequential that these boats and barges did not have the character of "personal property within the purview of section 5325, General Code," and (2) that consistently with the requirement of due process in the taxation of property of this kind the state was not authorized to make the tax assessments here in question. In this connection it may be observed that inasmuch as it appears that the taxes assessed on these boats and barges for the tax years 1945 and 1946 have been paid (Rec. p. 16), it may well be doubted whether anything more than a moot question is here presented with respect

to the taxability of this property for said tax years. See *The Central Iron and Metal Co. v. Evatt*, 27 O. O., 1.

Passing this point, however, and addressing ourselves to the merits of the question presented on this assignment of error, it is noted that section 5328, General Code, provides, among other things, that:

"All ships, vessels, and boats, and shares and interests therein, defined in this title as 'personal property,' belonging to persons residing in this state, and aircraft belonging to persons residing in this state, and not used in business wholly in another state, shall be subject to taxation."

Section 5325, General Code, defining the term "personal property" for purposes of taxation includes in this term "every share or portion, right, or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either [fol. 127] exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed, at a collector's office, or within a collection district in this state, or not."

Section 5366, General Code, characterizes as "taxable property" all the kinds of property mentioned or referred to in the above quoted provisions of section 5328, General Code. Section 5371, General Code, provides generally that personal property used in business shall be listed and assessed in the taxing district in which such business is carried on. This section, however, further provides as follows:

"Ships, vessels, boats and aircraft, and shares and interests therein, shall be listed and assessed in the taxing district in which the owner resides."

Inasmuch as it appears that at all of the times here in question these boats and barges were used in part in navigating the waters of the Ohio River bordering on this state, such boats and barges as the property of the appellant, an Ohio corporation having its domicile in this state, were

clearly taxable under the expressed terms of the above noted statutory provisions. In this connection it is pertinent to note, further, that by section 5388, General Code; it is provided, with certain exceptions not here important, [fol. 128] that personal property shall be listed and assessed at seventy per centum of the true value thereof, in money, on the day as of which it is required to be listed.

As to the constitutional question presented by appellant in its assignment of error with respect to the taxation of these boats and barges for said tax years, it may be observed that the above noted statutory provisions relating to the taxation in this state of property of this kind, were enacted in apparent recognition of the then established rule that consistently with the requirement of due process of law in the taxation of property of this kind, ships, vessels and boats which are designed for and are used in navigating the high seas, the Great Lakes or the inland waters of this country were taxable only at the domicile of the owner or owners of such property, unless such ships, vessels or boats have acquired an actual situs in another state by being engaged in navigation wholly within the limits of such other state. *Pioneer Steamship Company v. Evatt*, 18 O. O., 510, 514, and cases therein cited; *Ott v. Mississippi Valley Barge Line Company* (U. S. Supreme Court case No. 244), decided February 7, 1949; 93 L. Ed.—Advance Opinions—431, 434. This rule that in a situation such as that here presented, property of this kind can be taxed only at the domicile of the owner, has been limited by the decision of the United States [fol. 129] Supreme Court in the case of *Ott v. Mississippi Valley Barge Line Company*, supra, wherein it was held that a state other than that which is the domicile of the owner of boats and barges navigating the waters of the Mississippi and Ohio Rivers, may levy a tax extended on the proportionate value of such boats and barges represented by the total number of miles of the lines of navigation by such boats and barges in the taxing state as compared to the total number of miles of the entire line of navigation in said rivers. As to this it may be observed, however, that it does not appear in the facts of the above cited case that the boats and barges there in question had been taxed in the state where the owner thereof was incorporated and had its

domicile. Moreover, neither in the Ott case nor in any other case which has come to our attention has it been expressly held that the domiciliary state has not the power and authority to levy a tax on property of this kind extended on the value of such property or upon some stated statutory percentage thereof. If it be thought that the decision of the Supreme Court of the United States in the Ott case in some of its implications has the effect of limiting the above noted statutory provisions of this state providing for the taxation of the boats and barges here in question so as to render unconstitutional the taxes here in question on this assignment of error, it may be observed that the Board of Tax Appeals as an administrative and quasi judicial tribunal will not assume jurisdiction and authority to consider and determine such constitutional question. *National Distillers Products Corp. v. Glander*, 49 Abs., 330, 337. See *Hillsborough Township v. Cromwell*, 326 U. S., 620, 625, 90 L. Ed., 358, 364; *Schwartz v. Essex County Board of Taxation*, 120 N. J. L., 129, 132, affirmed 130 N. J. L., 177. In the case last above cited it was said:

"It is undisputable that the determination of the constitutionality of an act of the legislature rests with a judicial body; not with a quasi judicial body such as the State Board of Tax Appeals. The final responsibility to pass upon the constitutionality of a given piece of legislation rests in the courts and it is the duty of the various state agencies and administrative bodies to accept a legislative act as constitutional until such time as it has been declared to be unconstitutional by a qualified judicial body."

In this situation and in view of the fact that no question is here made as to either the true or list values of the boats and barges of the appellant for said tax years, the tax assessments here in question are affirmed except as to the assessments on the M. V. Mt. Vernon, a small towboat having a value of about \$3500, and which during the years 1944 and 1945 did not navigate any of the waters of the Ohio River bordering on this state; as to the assessments on this boat the order of the tax commissioner is reversed.

A further question submitted to the Board on the presentation of this case is that as to the taxability of certain

[fol. 131] machinery and equipment of various kinds which were in process of construction on January 1 in the tax years 1943, 1944, 1945 and 1946, respectively, but which as to the particular machinery and equipment here in question were unfinished and not in operation on said several tax assessment dates. This question with respect to the tax years 1943 and 1944 is presented on an assignment of error in the appeal filed herein as case No. 12488, and relates to an unfinished Houdry catalytic cracking unit at the company's refinery at Cleveland, the construction of which commenced in August 1942 but the construction of which was not completed until about July 1, 1944. By January 1, 1945, the Houdry catalytic cracking plant had been completed and put in operation. However, on that date the company had in process of construction in various counties of the state certain other items of machinery and equipment which were unfinished and not in operation on said date. Likewise on January 1, 1946, there were in process of construction in several different counties of the state certain items and units of machinery and equipment which were unfinished on said tax assessment date. The principal part of the property referred to in this connection was an unfinished thermal gas plant at the company's Cleveland refinery.

The appellant company in filing its combined tax returns as an inter-county corporation for the tax years above [fol. 132] referred to, did not as to any of such tax years list any item or unit of machinery and equipment which was in process of construction and unfinished upon tax assessment day in such year. As to this the appellant company admitted that the materials which were incorporated in these unfinished items or units became the property of the company upon delivery of the same to the several grounds upon which this machinery and equipment was being constructed. And it is further conceded by the appellant that these unfinished structures, representing the labor and material which had gone into the same, had the character of personal property—so far as the question here under consideration is concerned. And there is no dispute about the fact that these several structures were constructed for the purpose and in connection with the business of the appellant which it was conducting at these several locations.

As to this, the contention of the appellant is that these unfinished items or units of machinery and equipment were not "used," within the purview of section 5328 and related sections of the General Code which generally and with respect to property of this kind, limit the taxation of tangible personal property to that which is "located" and "used in business in this state." In this connection it is noted that section 5325-1, General Code, defining the term "used in business" as well as the term "business," itself, [fol. 133] provides:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; * * * 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Further as to this it appears that the refinery of the appellant at its Cleveland location and likewise, presumably, those at other locations as well, consist of a number of units each of which has more or less independent functions in the manufacture of petroleum products of different kinds. Each of such units is customarily referred to in the industry as a "plant." In this view the appellant contends that an unfinished item of machinery and equipment is obviously not "a part of a plant capable of operation" within the purview of section 5325-1, General Code, and that such unfinished item was not, therefore, "used in business" under section 5328 and other sections of the General Code providing for the taxation of tangible personal property. It is to be observed however that the above noted provisions of section 5325-1, General Code, were not enacted with special reference to either appellant's refineries at Cleveland or elsewhere or to petroleum refineries generally in this state. And in this view recognition must be given to

the general definition that in an industrial or commercial [fol. 134] sense, a "plant" includes real estate and all else that represents capital invested in the means of carrying on a business, exclusive of raw material or the manufactured product. This leads to the conclusion that as to the refinery property of the appellant each refinery as a whole at its location in Cleveland or elsewhere is "a plant" within the meaning of section 5325-1, General Code. Inasmuch as each unfinished item or machinery and equipment here in question was a part of a refinery or "plant" capable of operation and in actual operation and was kept and maintained as such, it was property "used" and "used in business" within the meaning of the taxing statutes here under consideration.

By appropriate assignments of error in the appeals above referred to the appellant has presented to this Board questions relating to the taxable values of this unfinished machinery and equipment for the several tax years above noted. It is thought to be appropriate, however, to defer the consideration of these questions until we have considered the questions herein presented with respect to the taxable valuation of the Houdry catalytic cracking plant as a completed and operating unit for the tax years 1945 and 1946, respectively.

As above noted herein case No. 14381 on the docket of the Board includes appeals filed herein by the appellant, [fol. 135] above noted, from final orders of the tax commissioner which modified and, as modified, confirmed an increased personal property tax assessment against the appellant for each of the tax years 1945 and 1946. One of the personal property tax units involved in this case, both as to the tax years 1945 and 1946, was the Houdry catalytic cracking plant, so-called, which was constructed primarily as a war facility for the purpose of producing high octane gasoline for aviation purposes in connection with the war effort. The construction of this plant was completed in June 1944 and the same as to the personal property comprised therein was taxable as such for said tax years as a part of the appellant's machinery and equipment at its Cleveland refinery, in Cleveland Taxing District, Cuyahoga County, Ohio. The total cost of constructing this catalytic cracking plant which consisted of a six case cracking unit,

a three case cracking unit and auxiliary structures and equipment, was \$9,099,360.39. The greater part of this construction work was done by the E. B. Badger and Sons Company of Boston, Massachusetts, under a contract therefor with the appellant company at a cost of \$7,669,032.76; and the balance of the work in the construction of this plant or unit—which consists principally in the installation of auxiliary equipment—was performed by The Standard Oil Company itself at a cost of \$1,430,327.65. The contract of the Badger Company for the work to be done [fol. 136] on an overall definitive estimate of \$5,249,930, including labor and material as well as the contractor's fee in the amount of \$566,880. It thus appears that as compared with the estimate there was an overrun in that part of the work done by the Badger Company under its contract with the appellant in the amount of \$2,419,102.76. The appellant concedes that a part of this overrun amounting to the sum of \$995,250 was due to additional items or other factors entering into the work done by the contractor, which were beyond that contemplated by the contract and which resulted in increased value to the completed work done by the Badger Company in the construction of this plant. Appellant contends however that the balance of said overrun, amounting to \$1,423,852 represented increased costs and expenses which were occasioned by unavoidable delays in the construction of said work and by other conditions of such nature, and that these increased costs and expenses in the amount herein stated did not add anything to the value of the completed plant; and that there should be an initial deduction of this amount from the total cost of the project as one of the steps in determining the true value of the completed unit for the tax years here in question. As to this the tax commissioner apparently concedes that of the total amount of this overrun the sum of \$988,000 thereof represents costs and expenses which were not reflected in the value of the completed plant [fol. 137] or unit. This overrun allowance made by the Department of Taxation and tax commissioner was on a percentage basis which was in line with an overrun allowance theretofore made by the tax commissioner with respect to a catalytic cracking plant of like kind constructed by another oil refining company in this state in the year

1939, at which time conditions affecting construction work of the kind here in question were obviously different from the conditions which obtained during the war years when the plant here in question was constructed. Moreover, the overrun allowance made by the Department of Taxation and by the tax commissioner in the amount above stated was, apparently, limited to some extent by the erroneous view entertained in the Tax Department that the catalytic cracking plant or unit of the appellant as constructed and completed was capable of processing fifty per cent more fuel as feed stock in the production of gasoline than that contemplated by the contract based upon the estimate above referred to. As to this it appears that this catalytic cracking plant as completed and put in operation then was and now is capable of processing daily 15,000 barrels of fuel oil as feed stock in the production of gasoline, and that this capacity of the plant was contemplated by the parties in the execution of the Badger Company contract for its construction. In this situation it is a matter of some difficulty to determine the amount [fol. 138] of the overrun on the cost and expense of constructing this project due to costs and expenses which are not reflected in the value of the plant as completed for operation. However, on a consideration of all of the evidence in this case we are of the view that an allowance of \$1,200,000 should be made on this account; and that a deduction of this amount should be made from the overall cost and expense of constructing the plant for the purpose of determining that part of the cost of such construction which is related to the true value thereof as a completed structure.

The appellant further contends that the construction cost of this plant as reduced by the overrun allowance should be further reduced by bringing such cost down to the construction cost level for the year 1939, which year, the appellant assumes, was the last year in which construction costs were reasonably normal. The construction work on this project was largely done in the year 1943, at which time construction costs, the appellant claims, were abnormally high as compared with those for the year 1939. In this connection it appears from the evidence (appellant's exhibit 15) that taking the figure 100 as the index basis

for construction cost in the year 1913 the index for construction costs for the year 1943 was 290 and that for the year 1939 was 236; which last named index figure is 81.4% of that for the year 1943. And appellant's contention is that this percentage should be applied to the net [fol. 139] cost of the construction of the plant as above determined for the purpose of bringing such cost down to the 1939 level as an index to the true value of the plant as constructed. As to this it is noted from the evidence that following the year 1939 and through the war years there was a steady and substantial increase in construction cost, and that following the end of the war there was a tremendous increase in construction cost; so that during the year 1947 the index for such cost for said year on the basis above noted was about 390 as compared with the index figures given with respect to the years 1939 and 1943. And based upon information readily available in engineering journals and other like sources, judicial knowledge can be taken of the fact that construction costs for the years 1948 and 1949 were substantially higher than those for the year 1947. It is apparent that construction cost during the latter part of the year 1942, during the year 1943 and during the first half of the year 1944, during which time this plant was under construction, were substantially less than the average of such construction costs from the year 1939 to 1949, inclusive. In this situation and inasmuch as no one can readily foresee the time when construction costs will be comparable to those for the year 1939 or to those for the year 1943, for that matter, we are of the view that consistently with the rule that in the [fol. 140] determination of true value of a fixed asset of this kind such value should be considered as something fairly constant over a period of time, and that while the assessment of such property is made as of a day certain the value thereof is established over a period of years, we can without injustice to the appellant take the actual net construction cost of this catalytic cracking plant as above determined as an index of its true value for tax purposes. In this view appellant's contention that the actual net cost of this plant should be reduced to the 1939 cost level, must be denied.

Giving effect to the figures above found and determined and deducting \$1,200,000 as the amount of the overrun from

\$9,099,360, the overall cost of the Houdry catalytic cracking plant, we obtain \$7,899,360 as a figure representing that part of the cost of the plant contributing to the value of the plant as completed. As to this it appears, however, that 10.6% of this cost amounting to \$837,332, was for the construction and installation of structures and equipment which were properly classified as real property. Deducting this sum from \$7,899,360 leaves us \$7,062,028 as that part of the cost which is reflected in the value of the plant as personal property. It further appears, however, that of the amount last named the sum of \$135,000 represents the cost of constructing foundations for an additional three case cracking unit as a [fol. 141] part of the plant, which was never completed; and which foundations, as idle equipment were given a value of \$13,500 instead of \$135,000, the cost of constructing the same. Making a proper adjustment of these figures we arrive at a valuation of the plant as personal property as of July 1, 1944, in the amount of \$6,940,528. Giving to this figure as the valuation of the plant as of July 1, 1944, a depreciation of 5%, amounting to \$347,026, we determine the true valuation of the plant as personal property on and as of tax listing date, January 1, 1945, to be \$6,593,502.

A further question presented in this case with respect to the assessment of appellant's machinery and equipment in Cleveland City Taxing District for the tax year 1945—including, of course, the Houdry catalytic cracking plant above referred to—is on an assignment of error that the tax commissioner on consideration of the appellant's application for review and redetermination as to the assessment complained of did not allow a reduction of the valuation of such machinery and equipment to or under the book value thereof notwithstanding the fact that the appellant did not for said tax year file any (902) claim as authorized and provided for by section 5389, General Code. As to this it appears that the appellant in filing its inter-county or consolidated personal property tax return for the tax year 1945 set out its machinery and equipment in Cleveland City [fol. 142] Taxing District at a book valuation of \$10,591,041. However the appellant did not in said tax return list this property as machinery and equipment used in manufacturing at a 50% valuation based on the book value of the property; but it did list this property at a 50% valuation

based upon the true value of this machinery and equipment, which true value was set out in said tax return as \$11,491.043 and which true value as returned by appellant was apparently the book value of this machinery and equipment as depreciated in accordance with the 302 formula prescribed by the tax commissioner which had been in effect for some years. And it further appears in this connection that the appellant paid the taxes for said tax year on this machinery and equipment on a list or assessed valuation based on this true value of the property as returned by the appellant. And apparently, the appellant paid the taxes on its machinery and equipment in this taxing district upon an assessment certificate directed to it and to the county auditor by the tax commissioner under date of August 13, 1945, after the tax commissioner had made an audit of appellant's tax return for said year. In this assessment certificate the tax commissioner set out the *assessed value* of all of the appellant's tangible personal property in Cleveland City Taxing District at \$8,684,960. And in making this assessment certificate, it does not appear that the tax commissioner in making his audit of appellant's tax return increased or [fol. 143] otherwise changed either the true valuation or list valuation of appellant's machinery and equipment in said taxing district as the same were set out in said tax return. Thereafter on February 11, 1947, the tax commissioner on reaudit of appellant's personal tax return for the year 1945 increased the *assessed* valuation of all of the appellant's tangible property in Cleveland City Taxing District from \$8,684,960, as above stated, to \$8,887,540—an increase of the list or assessed valuation of such property in the amount of \$202,580. It does not appear, however, that the tax commissioner in making this increase in the *list* or assessed valuation of appellant's tangible personal property in Cleveland City Taxing District increased or otherwise changed the valuation of appellant's Houdry catalytic cracking plant or other machinery and equipment in the taxing district. On the contrary it appears that this increase in the list or assessed value of such tangible personal property was due solely to an adjustment and resulting increase made by the tax commissioner in the valuation of the appellant's inventory property at this location.

Following the receipt of this amended certificate of valuation made by the tax commissioner, the appellant on March 12, 1947, filed with that officer an application for review and redetermination of said amended assessment in which no complaint is made as to the only increase made in and by said amended assessment, but in which, among other things, the appellant said:

[fol. 144] "Our claim is that the aggregate assessed value of tangible property in Cleveland, shown on the amended preliminary assessment certificate as \$8,887,540.00 should be reduced by \$2,373,630.00 since the listed value of the machinery and equipment at the Catalytic Cracking Plant in our Cleveland refinery should be not, \$3,873,636, the amount for which it was assessed in the amended preliminary assessment certificate, but \$1,500,000.00."

Assuming that the list or assessed value of the Houdry catalytic cracking plant was \$3,873,636, as stated by the appellant in its application for review and redetermination, it follows that since this catalytic cracking plant as machinery and equipment used in manufacturing was listed at 50% of its true value both in the amended assessment certificate and in the original assessment certificate, the true value of this catalytic cracking plant as the same was returned for taxation by the appellant as a part of all of its machinery and equipment in the Cleveland City Taxing District must have been \$7,747,272.

In this situation it appeared when this application for review and redetermination came on for consideration by the tax commissioner that the true value of all the machinery and equipment owned and used by the appellant in refining in Cleveland, Cuyahoga County, and upon the basis of which the appellant paid taxes on such property for the year 1945, was \$900,002 more than the book value of such machinery and equipment as returned by the taxpayer for said year. The tax commissioner upon consideration of the application [fol. 145] for review and redetermination found that the catalytic cracking plant above referred to was "assessed in excess of the true value thereof in the amount of \$988,000 by reason of allowable excessive costs and equip-

ment not in use but that in view of the judicial determination (*Willys-Overland Motors, Inc. v. Evatt*, 141 O. S., 402) he is without jurisdiction to find a value below net depreciated book value and orders that the value of such property be reduced in the amount of \$561,027.00 being the amount that the machinery and equipment used in manufacturing in Cuyahoga County exceeded the net depreciated book value thereof, and it is ordered that a final assessment certificate issue correcting the assessment in the amount so stated." This figure of \$561,027, above noted, was the amount by which the true value of all machinery and equipment used by the appellant in refining throughout the state as the same was returned by the appellant exceeded the book value thereof as set out in appellant's tax return. And the tax commissioner, apparently, used this figure in making the reduction above noted instead of the figure of \$900,002 as intended. The tax commissioner after giving effect to the reduction made by him as above noted and after making certain increases in the valuation of this machinery and equipment in the aggregate amount of \$47,425 due to an adjustment of depreciation rates as to some items of such [fol. 146] property and to the valuation of certain items of machinery and equipment in progress of construction, fixed the valuation of such machinery and equipment in Cleveland Taxing District in the sum of \$10,977,441.

Although the tax commissioner on the consideration of the appellant's application for review and redetermination had no jurisdiction and authority to reduce the valuation of this machinery and equipment below the book value thereof in the absence of a 902 claim for such reduction, *Willys-Overland Motors, Inc. v. Evatt*, Tax Commr., 141 O. S., 402; *Wright Aeronautical Corp. v. Glander*, Tax Commr., 151 O. S., 29, said officer upon his finding of an overrun in the cost of constructing said catalytic cracking plant, would have been warranted in reducing the valuation of the machinery and equipment in this taxing district down to the sum of \$10,591,041, the book value thereof, were it not for the fact that the appellant had previously paid taxes on this property at a higher valuation. As to this it will be recalled that the appellant returned this machinery and equipment for taxation at a true valuation of \$11,491,043 including, apparently, said catalytic cracking plant at a valuation of

\$7,747,272; and taxes were paid by the appellant for the tax year 1945 on the basis of this true value of the property as returned by the taxpayer. In this situation the question presented to the Board of Tax Appeals upon this appeal as to the right of the taxpayer to a reduction in the valuation of this machinery and equipment from the valuation of [fol. 147] \$11,491,043, at which it was returned by the appellant for purposes of taxation to the sum of \$10,591,041, the book valuation of this property, is a moot question which this Board is not authorized or required to determine. The Central Iron and Metal Co. v. Evatt, 27 O. O. 1. See Board of Education v. Budget Commission, 139 O. S. 312, 313; Minor v. Witt, 82 O. S. 287; Travis v. Public Utilities Commission, 123 O. S., 335. It follows, therefore, that the final order made by the tax commissioner on appellant's application for review and redetermination (assuming, but not deciding, that said application was timely and properly filed) with respect to the true valuation of appellant's machinery and equipment including said catalytic cracking plant in Cleveland City Taxing District for the tax year 1945, must be, and hereby is, affirmed; and this notwithstanding the fact that, as above noted, this Board has herein found and determined that the true value of said catalytic cracking plant on and as of January 1, 1945, was substantially less than the valuation at which this plant was returned for taxation and upon which the taxes were paid.

A further question presented in case No. 14381 is on an appeal by the appellant from a final order of the tax commissioner on appellant's application for review and redetermination with respect to the valuation of said Houdry [fol. 148] catalytic cracking plant for the tax year 1946. As to this it appears that the appellant in its personal property tax return for the tax year 1946 returned its machinery and equipment in Cleveland City Taxing District at a true value of \$4,082,711; which valuation did not include that of the Houdry catalytic cracking plant, the cost of which plant as a war facility had been depreciated or amortized down to zero on the books of the company. However, the 902 claim filed by the appellant with its tax return states that the valuation of the machinery and equipment in the Cleveland Taxing District as returned by the appellant "should be increased by \$3,000,000 to reflect and include the true

value of the Houdry unit." On August 12, 1946, the tax commissioner issued a preliminary assessment certificate on and with respect to the tangible personal property returned for taxation by the appellant for said tax year. Thereafter, on or about the month of December, 1946, the tax commissioner made a reaudit of appellant's tax return for said year in which that officer found and determined that the true value of said catalytic cracking plant for the tax year 1946 was \$6,916,129; and adding this amount to the valuation of the machinery and equipment other than said catalytic cracking plant returned by the appellant as aforesaid, the tax commissioner determined the true valuation of appellant's machinery and equipment in the Cleveland Tax-[fol. 149] ing District to be \$10,998,840. Following this reaudit the tax commissioner made and certified an amended assessment certificate including therein the assessed value of the Houdry plant as determined on said audit. Following the certification of this amended preliminary tax assessment the appellant filed with the tax commissioner an application for review and redetermination in which it stated that the true value of the machinery and equipment in the catalytic cracking unit, as of January 1, 1946, was \$3,000,000, and that it should accordingly be included in its 1946 personal property tax assessment at a listed value of \$1,500,000 instead of \$3,458,060, the listed value at which the tax commissioner included it in his amended preliminary assessment certificate.

The tax commissioner upon consideration of appellant's application for review and redetermination allowed a reduction of \$932,360 from the cost of the construction of said catalytic cracking unit by reason of excessive costs not contributing to the value of the unit; and giving effect to such reduction in the original cost of the construction of this unit, the tax commissioner determined that this catalytic cracking plant or unit had a valuation on and as of January 1, 1946, of \$5,983,769. And the tax commissioner after including certain machinery and equipment which the appellant had failed to list in its tax return, some of which was in process of construction, determined that all of the [fol. 150] appellant's machinery and equipment in Cleveland Taxing District had a valuation of \$10,960,267 for the tax year 1946.

On the presentation of this case to the Board of Tax Appeals on this appeal, the appellant upon considerations above discussed and to some extent denied herein contends that this Houdry catalytic cracking plant as personal property on and as of the time of the completion thereof, July 1, 1944, had a valuation of \$5,589,707. In the determination of the valuation of this plant for the tax year 1946 the appellant contends on the basis of some supporting evidence that 60% of the cost of constructing this plant consisting, as above noted, of a six case cracking unit and a three case cracking unit, was attributable to the six case cracking unit, and that 40% of the total cost was in the construction of the three case cracking unit. With this assumption the appellant ascribes a valuation to that part of the plant as personal property other than the three case unit and the foundations for the additional cases which were never constructed, of \$3,353,824. Giving this stated valuation a depreciation of 15%, amounting to \$503,073, the appellant determines the true value of the personal property in the Houdry plant other than the three case unit and the additional foundations a value of \$2,850,751 as of January 1, 1946.

[fol. 151] Further in this connection the appellant contends that aside from the fact, as claimed, that this Houdry catalytic cracking plant, which was of the fixed-bed catalytic type, was to some extent outmoded by January 1, 1946, by reason of the development and use in the industry of the fluid type of catalytic plant, the three case unit, it is contended, became obsolete on the termination of the war; and this for the reason, as claimed, that this unit was no longer needed for making high octane gasoline for aviation purposes and appellant could have refined motor vehicle gasoline more economically by the use of its thermal cracking unit and the six case cracking unit without making any use of the three case unit. And in this view the appellant contends, in effect, that the only value that the three case unit had on January 1, 1946, was such value as the unit might have in the contemplated conversion of the same into a catalytic cracking unit of the fluid type; and that the value of the three case unit was between \$700,000 and \$1,000,000. Grouping this three case unit and the foundations of the once projected but never finished additional three case unit

together, the appellant ascribes a value to the same of \$1,000,000. Adding this sum to the determined true value of personal property in the Houdry plant other than the three case unit and such additional foundations, the appellant determines the true value of the Houdry catalytic plant as of January 1, 1946, to be \$3,850,751.

[fol. 152] In the consideration of the immediate question here presented it is noted that although this three case cracking unit in its normal operation processed a considerable quantity of virgin feed stock obtained both from the crude and vacuum pipe stills operated by the company at this refinery, the greater amount of feed stock which went into this three case unit was that which was obtained as an end product from both the thermal and six case cracking units; and that the chief purpose of the three case unit was to give to the gasoline processed by it a higher octane quality than the gasoline produced in either the thermal cracking unit or in the six case catalytic cracking unit. In this connection it appears from the evidence (appellant's exhibit 25A) that during the calendar year 1945, including nine months of the war period, the amount of feed stock of various kinds processed in this three case catalytic cracking unit was 4601 barrels; in the calendar year 1946, 4291 barrels; in the calendar year 1947, 4096 barrels; and during the first six months of the calendar year 1948, 3820 barrels. It appears that although following the end of the war there was a marked decrease in the demand for aviation gasoline there was at that time a greater increase in the demand for gasoline for motor vehicle use. And in meeting this demand the company as late as June 1948 was making a more active use of this three case cracking unit [fol. 153] than was made of it during the last of the war years. In this situation the Board is not impressed by the contention of the appellant that on and as of January 1, 1946, this three case unit was obsolete and that it had no valuation other than such as it might have for conversion purposes. On the contrary we are of the view that on January 1, 1946, as on January 1, 1945, this three case unit should be considered as a part of the Houdry catalytic cracking plant as a whole and as an operating unit thereof.

Coming to the determination of the value of the Houdry catalytic cracking plant as personal property for the tax

year 1945 and as of January 1 in said year, the Board has found herein that the value of the plant on and as of July 1, 1944, was and is the sum of \$6,940,528. Giving to this valuation a depreciation of 15% covering the period of time between July 1, 1944, and January 1, 1946, and amounting to \$1,041,089, the Board determines the value of this plant on and as of January 1, 1946, to be \$5,899,439. Inasmuch as this valuation of the plant is slightly less than that determined by the tax commissioner in the final order complained of herein such final order is hereby modified in order to conform to the finding of the Board with respect to the valuation of this plant..

As before indicated herein the appellant's findings in cases Nos. 12488 and 14381 present questions relating to the assessment of certain unfinished machinery and equipment [fol. 154] which was in process of construction at the appellant's Cleveland refinery on tax listing day for the tax years 1943, 1944, 1945 and 1946, respectively. As to the tax years 1943 and 1944, the only property of this kind here in question was the then unfinished Houdry catalytic cracking plant or unit above referred to; and as to the tax years 1945 and 1946, the property in question was certain other capital equipment which was unfinished and in the process of construction on tax listing date in said respective years.

Upon considerations relating to the construction and application of sections 5328 and 5325-1, General Code, the appellant contends, as before noted, that personal property of this kind is not taxable at all; and, in the alternative, the appellant further contends that if it is determined that this property is taxable, it should be assessed, not as machinery and equipment, but either on the average basis as personal property of a manufacturer within the purview of sections 5385 and 5386, General Code, or as "idle equipment" and at 10% of the cost thereof pursuant to the tax commissioner's directive under date of May 6, 1943, relating to the assessment of property in this category. As before noted, the Board is of the view that the property here in question is taxable. And it remains for us to determine the manner in which this property should be assessed and the valuation of the same for purposes of taxation in said respective tax years.

Appellant's contention that personal property of a manufacturer of this kind and in this condition should be assessed on the average basis provided for by sections 5385 and 5386, General Code, is predicated on the stated view that clause 4: "When stored or kept on hand as material, parts, products or merchandise" as the same is found in section 5225-1, General Code, defining the term "used" within the purview of section 5328, General Code, providing for the taxation of personal property "used in business," is intended to cover inventories of all kinds, and is coextensive with section 5385, General Code, which provides for the assessment on the average value basis: " . . . of all articles purchased, received or otherwise held for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying or refining, and of all articles which were at any time by him manufactured or changed in any way, . . . " As to this, we are of the view that the "articles" referred to in the above quoted provisions of section 5385, General Code, refers solely to articles from which and out of which the manufactured products are made—that is, the manufacturer's raw material or stock,—*Sebastian v. Ohio Candle Co.*, 27 O. S., 459, 463; *Engle v. Sohn*, 41 O. S., 691, 693; *Commissioners v. Rosche Bros.*, 50 O. S., 103, 109; and the "articles" [fol. 156] therein referred to do not, in our opinion, include machinery, tools or other equipment by means of which such articles as the manufacturer's raw material or stock are transformed, changed or otherwise used in the manufacture of the finished product. In this connection it is noted that section 5386, General Code, which makes provision as to the manner in which the average value of the personal property of the manufacturer, so assessed is to be determined, further provides as follows:

"A manufacturer shall also list all engines and machinery of every description used, or designed to be used, in refining or manufacturing, and all tools and implements of every kind used, or designed to be used, for such purpose, owned and used by such manufacturer."

This statutory provision is not only persuasive to the view that the property here in question which is "designed

to be used" in refining and manufacturing, is taxable, but, read with the applicable provisions of section 5388, General Code, this provision leads to the view that property of this kind is to be assessed, not on the average value thereof, but upon the true value thereof as of tax listing day, and is to be listed at 50% of such true value.

The appellant further contends that if this unfinished machinery and equipment is not assessable on the average [fol. 157] value thereof under the provisions of sections 5385 and 5386, General Code, then and in that event this property should be assessed as idle equipment at 10% of the original cost thereof under a directive of the tax commissioner under date of May 6, 1943, which is as follows:

"Subject: Valuation of Idle Equipment: Dated 5/6/43: Such equipment shall, under certain conditions, be listed at 10% of original cost; such cost to include that of foundation and installation.

Temporary idleness for purpose of overhauling and repair or resulting from seasonable operations is not sufficient cause.

Equipment ordinarily entitled to such listing would be that in buildings boarded up, in departments closed off, or removed from production line.

To receive such consideration, the taxpayer must file a claim, in writing, at the time of filing the return.

Such claim should show cost and value as listed in the return and other necessary information in support of the claim."

As to the contention of the appellant it may be observed that aside from the question (not here decided) as to the authority of the tax commissioner to make and issue this directive—it is not a rule—in view of the requirement that machinery and equipment is to be assessed on the basis of the true value thereof and listed at 50% of such true value, and aside from the obvious view that the property here in question does not come within either the letter or [fol. 158] purpose of this directive, the appellant can not in these cases avail itself of this directive for the purpose intended, and this for the reason it did not in making its tax returns for the several tax years here in question make

any claim that this property should be taxed as idle equipment.

It follows from what has been said that the Board is of the view that this unfinished machinery and equipment here in question is to be taxed as personal property and as is other machinery and equipment on the basis of the true value thereof on and as of tax listing day of the several tax years above referred to, and is to be assessed at a list valuation of 50% of such true valuation as prescribed by section 5388, General Code. As above noted, the only personal property of this description which is involved in this case with respect to the tax years 1943 and 1944 is the then unfinished Houdry catalytic cracking plant. As to this it further appears that on and as of January 1, 1943, the overall cost of that part of the plant represented by the personal property therein was \$435,000. In this case it is noted that the Board in determining the true valuation of the then completed Houdry plant on and as of July 1, 1944, deducted from the overall cost of the plant that part thereof represented by excessive costs and expenses of the construction which did not contribute to the value of the plant, which excessive costs and expenses [fol. 159] amount to \$1,200,000—about 13.2% of the overall cost of the plant. Applying as a deduction the same percentage of overrun to the overall cost of the unfinished structure on and as of January 1, 1943, we determine the true value of the plant as of said date to be \$377,580 (list value \$188,790). On and as of January 1, 1944, the overall cost of the plant as personal property was \$6,220,575. Deducting from this sum the same percentage of overrun for excessive costs and expenses in construction, the true value of the plant as of said date is determined to be the sum of \$5,399,459 (list value \$2,699,729). By January 1, 1945, the Houdry catalytic cracking plant had been completed and was then in operation. However, the appellant company had at that time certain other unfinished equipment which was in progress of construction and to which the tax commissioner ascribed a true value for said tax year of \$80,652, of which \$41,716 was the value of that part of the property which was intended for use in manufacturing and which was assessed at 50% of such value, and \$38,936 was regarded as the value of that part of the unfinished

equipment which was intended for use other than manufacturing, and which was assessed at 70% of such value. There is nothing in the evidence to show that there was any overrun on account of excessive costs and expenses in the construction of this unfinished equipment; and the valuation placed upon the same by the tax commissioner is hereby determined to be correct.

[fol. 160] On January 1, 1946, the appellant had in process of construction certain then unfinished equipment the cost of which up to that time was \$928,686 of which \$904,651 represented the then cost of machinery intended to be used in manufacturing and which was assessed at 50% of such valuation, and \$24,055 represented that part of the unfinished equipment which was intended to be used for other purposes and which was assessed at 70% of valuation. There is no suggestion in the evidence that any part of the cost of constructing this equipment was due to an overrun of excessive costs and expenses not contributing to the value of the equipment. And the order of the tax commissioner determining the true value of the equipment in accordance with the figures above stated is hereby affirmed. Inasmuch as the true valuation of the unfinished Houdry catalytic cracking plant on and as of January 1, 1943, and January 1, 1944, respectively, as here determined, are somewhat less than the valuations of said property as of said respective dates, the order of the tax commissioner determining such valuations is hereby modified so as to conform to the findings of the Board. As to the unfinished equipment of the appellant which was in progress of construction on January 1, 1945, and January 1, 1946, the true valuations thereof as determined by the tax commissioner are hereby affirmed.

Case No. 14514, hereinbefore referred to, is an appeal [fol. 161] filed herein by the appellant above named under date of June 17, 1948, from a final assessment made by the tax commissioner under date of May 19, 1948, under the assumed authority of section 5395, General Code, on and with respect to tangible personal property of the appellant for the tax year 1945 including machinery and equipment and other tangible personal property at Cleveland refinery in Cleveland City Taxing District, Cuyahoga County, Ohio, the assessment of which property for said tax year as

modified on the appellant's application for review and redetermination was confirmed by the tax commissioner by a final order of the tax commissioner under date of April 14, 1948, and from which order said appellant filed an appeal with this Board under date of May 13, 1948; which appeal was docketed as one of the appeals in case No. 14381, and is considered and determined herein. By reason of the provisions of section 5395, General Code, which excludes from the list of taxable property as to which a final assessment may be issued under the authority of this section "any taxable property concerning the assessment of which an appeal has been filed under section 5611 of the General Code," the Board is of the view that the tax commissioner was without authority to issue this final assessment on and with respect to machinery and equipment and other tangible property of the appellant in Cleveland City Taxing District, which was the subject of the appeal filed [fol. 162] herein in case No. 14381, above referred to, and in this respect the final assessment and assessment certificate of the tax commissioner under date of May 19, 1948, is reversed, set aside and held for naught. This order is without prejudice to the issues with respect to the assessment of said personal property as the same has been considered and determined on the appeal for the tax year 1945 filed herein under date of May 13, 1948.

Except as otherwise indicated herein the order and assessments complained of in these several appeals are affirmed; and the several cases above noted are remanded to the tax commissioner with directions to make and issue corrected assessment certificates in conformity with the findings and determinations of the Board made herein.

See memo. attached.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation of Ohio this day made with respect to the above matter.

(Sgd.) Joseph D. Bryan, Secretary.

BBP

[fol. 163]

CONCURRING MEMORANDUM.

SHERICK:

I concur in all matters decided, save and except that portion of the first question presented and determined, which has to do with the taxation of boats and barges transporting crude oil between Mississippi river points and Mt. Vernon, Indiana, and Bromley, Kentucky. Since the State of Kentucky owns to the north shore of the Ohio river at low water mark, and these boats and barges never docked in Ohio ports, such boats and barges never entered the State of Ohio during the taxing period. I am of equally firm opinion that the Board of Tax Appeals has no power or authority to declare all or any part of an Act of the Legislature unconstitutional. I feel that taxation of these vessels can only be sustained upon the words "*in navigating any of the waters within or bordering on this state, whether such ships, vessel, or boat is within the jurisdiction of this state or elsewhere,*" as found in G. C. Section 5325. To my notion any such purpose and intent to tax tangible personal property has already been held unconstitutional in the case of *Floyd v. Light and Heat Co.*, 111 O. S., 57. The court therein was considering G. C. Section 5424 and the right, purpose and intent of the State of Ohio to tax tangible personal property situated outside of Ohio. In broad and general terms the court therein said at pages 74 and 75:

[fol. 164] "Another important principle to be observed is that which forbids *any attempt* to levy taxes upon property beyond the territorial boundaries of the state. This is a *general principle which has application to all forms of taxation*."

"Upon principle as well as upon the authority of these cases we adhere to the doctrine that in the construction of Section 5424, General Code, *there must be no taxation of property not 'within this state.'*"

I fully realize that these observations are not carried into the syllabi, but the statements made are so uniformly the law of the land, and so broad and comprehensive in scope in condemning any such legislative purpose, intent and design in any statute enacted to that end, that what is therein said

is as fully applicable to G. C. Sec. 5325 as it was to G. C. Sec. 5424. The very principle sought to be accomplished in G. C. Sec. 5325 was found therein not to be able of accomplishment. The words "*any attempt*" to my notion are synonymous with "*any statute which attempts.*"

I feel fortified in my conclusion by the statement of the court made in Columbus Met. Housing Auth. v. Thatcher, Aud., 140 O. S., 38. The court therein had this to say, on page 43 thereof, concerning the omission of the word "exclusively" from G. C. Sec. 5351, an exemption statute:

"The word 'exclusively' may not be read out of this section (5351) and *any statute which intentionally disregard this feature would be unconstitutional.*"

[fol. 165] The errors in said decision which Appellant deems prejudicial to it, and of which it complains, listed separately with respect to each of the consolidated cases, are as follows:

A. With respect to Case No. 12488

1. The decision of the Board of Tax Appeals is unreasonable and unlawful.

2. The Board of Tax Appeals erred in holding that any machinery in process of construction could legally be included in the assessment of Appellant's tangible personal property for 1943 or 1944.

3. Even if machinery in process of construction were properly includible in the assessment of Appellant's tangible personal property for 1943 or 1944, the Board of Tax Appeals erred in valuing it at more than its true value in money, which was \$298,845 for 1943 and \$4,273,535 for 1944, and in assessing it at more than fifty percent of such values.

4. Even if machinery in process of construction were properly includible in the assessment of Appellant's tangible personal property for 1943 or 1944, the Board of Tax Appeals erred in failing to hold that it must be valued on the average value basis referred to in Section 5386 of the General Code, and in failing to hold that it must be assessed at fifty percent of such average values.

[fol. 166] 5. The Board of Tax Appeals erred in holding that there should be included in the total final assessed

value for Cleveland Taxing District for 1943 an assessed valuation of \$188,790 for machinery in process of construction, whereas properly no machinery in process of construction should have been included therein.

6. The Board of Tax Appeals erred in holding that there should be included in the total final assessed value for Cleveland Taxing District for 1944 an assessed valuation of \$2,699,729 for machinery in process of construction, whereas properly no machinery in process of construction should have been included therein.

7. The decision of the Board of Tax Appeals is contrary to law, not supported by the evidence and against the weight of the evidence, and contains other errors apparent on the face of the record.

B. With respect to Case No. 14381

1. The decision of the Board of Tax Appeals is unreasonable and unlawful.

2. The Board of Tax Appeals erred in failing to hold that the taxation of any of Appellant's crude oil boats and barges by the State of Ohio for the years 1945 and 1946 would violate the statutes of Ohio, in view of the fact that during such years such boats and barges were not used in Ohio, and their use in waters bordering on Ohio was insubstantial.

[fol. 167] 3. The Board of Tax Appeals erred in failing to hold that taxation of any of Appellant's crude oil boats and barges by the State of Ohio for the years 1945 and 1946, even if permitted by the Ohio statutes, would deprive Appellant of its property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, since such boats and barges had no taxable situs in Ohio for either of such years.

4. The Board of Tax Appeals erred in failing to eliminate entirely from Appellant's 1945 personal property tax assessment its crude oil boats and barges, which were found by the Tax Commissioner to have a true value of \$1,213,322, and in failing to eliminate entirely from Appellant's 1946 personal property tax assessment Appellant's boats and barges which were found by the Commissioner to have a true value of \$1,201,885.

5. The Board of Tax Appeals erred in indicating that all the taxes assessed against Appellant's boats and barges for 1945 and 1946 had been paid, whereas in fact only a portion of the taxes assessed against such boats and barges for each such year have been paid.

6. The Board of Tax Appeals erred in holding that any machinery in process of construction could legally be included in the assessment of the Appellant's tangible personal property in Cuyahoga County for 1945 or 1946.

[fol. 168] 7. Even if machinery in process of construction were properly includible in the assessment of Appellant's tangible personal property in Cuyahoga County for 1945 or 1946, the Board of Tax Appeals erred in failing to hold that it must be valued on the average value basis referred to in Section 5386 of the General Code, and failing to hold that it must be assessed at fifty percent of such average value.

8. The Board of Tax Appeals erred in holding that there should be included in the Appellant's personal property tax assessment for Cleveland City Taxing District for 1945 a true value of \$33,979 for machinery in process of construction intended to be used in manufacturing, and a true value of \$30,664 for machinery in process of construction intended not to be used in manufacturing, whereas properly no machinery in process of construction should have been included therein.

9. The Board of Tax Appeals erred in holding that there should be included in the Appellant's personal property tax assessment for Cleveland City Taxing District for 1946 a true value of \$893,788 for machinery in process of construction intended to be used in manufacturing, and a true value of \$10,510 for machinery in process of construction intended not to be used in manufacturing, whereas properly no machinery in process of construction should have been included therein.

[fol. 169] 10. The Board of Tax Appeals erred in making an inadequate allowance for wholly excessive costs in the valuation of the personal property in Appellant's catalytic cracking plant at Cleveland for the tax years 1945 and 1946.

11. The Board of Tax Appeals erred in holding that no reduction should be made in the valuation of the personal property in Appellant's catalytic cracking plant at Cleveland for the years 1945 and 1946 to reflect the inflated level

of general construction costs during the war years in which such plant was constructed. The Board also erred in considering events occurring in years subsequent to 1945 and 1946 in arriving at the valuation of the personal property in said plant for 1945 and 1946, and in holding that the "net construction cost" of said plant could justly be used as "an index of its true value for tax purposes."

12. The Board of Tax Appeals erred in holding that the true value of the personal property in Appellant's Cleveland catalytic cracking plant as of January 1, 1945 was in excess of \$5,310,222.

13. The Board of Tax Appeals erred in holding that even though the net book value of Appellant's personal property used in manufacturing in Cleveland Taxing District on January 1, 1945 was \$900,002 less than the valuation on the basis of which Appellant had paid its 1945 personal property taxes, and even though the true value of such [fol. 170] property on such date, as found by the Board, was even less than such net book value, nevertheless the fact that Appellant had paid its personal property taxes for 1945 without protest on such higher valuation basis rendered the matter moot and deprived the Board of authority to reduce the valuation of such property for such year even by \$900,002, which would bring its valuation down to the net book value thereof.

14. The Board of Tax Appeals erred in denying, on December 15, 1949, Appellant's application for rehearing, which was based on the matters set forth in 13 above.

15. The Board of Tax Appeals erred in refusing to make any reduction in the valuation for 1946 of the personal property in Appellant's catalytic cracking plant at Cleveland to reflect the obsolescence and peacetime inutility of the three-case unit thereof, which was constructed for war purposes and could be used economically only for war purposes.

16. The Board of Tax Appeals erred in holding that the true value of Appellant's Cleveland catalytic cracking plant as of January 1, 1946 was in excess of \$3,850,750.78.

17. The Board of Tax Appeals erred in failing to order a reduction in the true value as of January 1, 1946 of personal property of Appellant used in manufacturing in Cleve.

[fol. 171] land City Taxing District to \$7,933,461, and in failing to order a reduction in the true value as of January 1, 1946 of personal property of Appellant not used in manufacturing in Cleveland City Taxing District to \$813,085.

18. The Board of Tax Appeals erred in denying Appellant the right to cross-examine the Tax Commissioner's witness Mr. Adams with respect to his valuation of the catalytic cracking plant of the Sun Oil Company, with respect to which Mr. Adams had testified on direct examination as bearing on the valuation which he had made of Appellant's catalytic cracking plant for the years 1945 and 1946, and in denying Appellant the right to make protest of Mr. Adams' probable testimony in order to show that the error in denying such right of cross-examination was prejudicial.

19. The decision of the Board of Tax Appeals is contrary to law, not supported by the evidence and against the weight of the evidence, and contains other errors apparent on the face of the record.

C. With respect to Case No. 14514

Appellant assigns no error to the decision of the Board of Tax Appeals in Case No. 14514, since that case was an appeal from a final assessment for the year 1945 and the Board held in its decision that such final assessment should not have been made and was a nullity.

[fols. 172-197] Wherefore, Appellant prays that this Honorable Court modify the decision and entry of the Board of Tax Appeals hereinbefore quoted so as to correct the errors herein complained of, and that it enter final judgment in accordance with such modification.

Respectfully submitted, The Standard Oil Company,
Appellant, by (S.) McAfee, Grossman, Taplin,
Hanning, Newcomer & Hazlett, Attorneys for The
Standard Oil Company, Appellant.

[fol. 198]

BEFORE BOARD OF TAX APPEALS

NOTICE OF APPEAL

(Personal Property Tax Assessment for 1945)

(No. 14,381)

(Filed May 13, 1948)

The Standard Oil Company, appellant herein, hereby gives notice of appeal to the Board of Tax Appeals from the final determination made by the Tax Commissioner of Ohio with respect to the application of appellant for review and redetermination of an increased personal property tax assessment for the year 1945, said application being Case No. 3,327 before the Department of Taxation of Ohio. A true copy of the notice sent by the Tax Commissioner to appellant of said final determination is attached hereto as Exhibit "A" hereof and incorporated herein by reference.

The errors in said final determination of the Tax Commissioner herein complained of, are as follows:

1. The Tax Commissioner erred in not granting in its entirety the application filed by appellant for review and redetermination with respect to its 1945 Inter-county personal property tax return on March 12, 1947.

2. The Tax Commissioner erred in failing to eliminate from appellant's 1945 personal property tax assessment towboats and barges, having a true value of \$1,322,863.00, and in holding that said boats and barges were taxable in Ohio.

3. The Tax Commissioner erred in including any machinery in process of construction in the assessment of appellant's tangible personal property for 1945.

4. Even if machinery in process of construction were properly includible in appellant's personal property assessment [fol. 199] ment for 1945, the Tax Commissioner erred in not valuing it for such year as idle equipment, at not more than 10% of its cost—that is, at \$4,171.60, instead of \$41,716.00, for property used in manufacturing; and at \$3,893.00, instead of \$38,936.00, for property not used in manufacturing.

5. Even if machinery in process of construction were properly includible in appellant's personal property tax assessment for 1945, the Tax Commissioner erred in not valuing it on the average value basis referred to in Section 5386 of the General Code.

6. The Tax Commissioner erred in holding that there is no authority in law or administrative procedure for allowing deductions for the inflated level of general construction costs incident to the war and its aftermath in the valuation for tax purposes of machinery and equipment built during the war years.

7. The Tax Commissioner erred in making an adequate allowance for wholly excessive costs, and for peacetime inutility of equipment constructed for war purposes, in his valuation for tax purposes of appellant's catalytic cracking unit at Cleveland for the tax year 1945.

8. The Tax Commissioner erred in holding that the true value of appellant's Cleveland catalytic cracking unit as of January 1, 1945, was in excess of \$3,000,000.00.

9. The Tax Commissioner erred in holding that under the decision of *Willys-Overland Motors, Inc. v. Evatt*, 141 O. S. 402, he did not have discretionary jurisdiction to find a value for appellant's personal property below net depreciated book value.

[fol. 200] 10. The Tax Commissioner erred in holding that the value listed on appellant's return for machinery used in manufacturing in Cuyahoga County was only \$561,027.00 in excess of net depreciated book value, whereas in fact the value so listed was \$913,448.00 in excess of net depreciated book value.

11. The Tax Commissioner erred in holding that the net depreciated book value shown on appellant's return limited the allowable deduction in the true value of appellant's Cleveland catalytic cracking unit to \$561,027.00, whereas in fact the net depreciated book value so shown imposed no limitation in the amount of reduction allowable.

12. The Tax Commissioner erred in failing to reduce the amended true value as of January 1, 1945 of personal property of appellant used in manufacturing in Cleveland, Cuyahoga County, to \$6,768,317.00; in failing to reduce the amended true value as of January 1, 1945 of

personal property of appellant not used in manufacturing, in Cleveland, Cuyahoga County, to \$611,076.00; and in failing to reduce the amended true values as of January 1, 1945 of personal property of appellant in other taxing districts listed in said final determination at figures excluding the values of property in process of construction in each such taxing district, which values are listed in Schedule 3 attached to appellant's letter to appellee dated October 31, 1947.

13. The Tax Commissioner erred in finding that appellant "failed to list" personal property of any of the types referred to in said final determination, other than property in process of construction which appellant has always contended is not subject to taxation.

[fol. 201] This appeal is on questions of law and fact.

The Standard Oil Company, an Ohio Corporation,
by McAfee, Grossman, Taplin, Hanning, New-
comer & Hazlett, Its Attorneys, 1500 Midland
Building, Cleveland 15, Ohio, Tel: Cherry 2600.

May 12, 1948.

[fol. 202] EXHIBIT "A" TO NOTICE OF APPEAL

Department of Taxation of Ohio

No. 3,327

In the Matter of the Application for Review and Redetermination of THE STANDARD OIL COMPANY, Cleveland, Ohio
(Inter-County), for the year 1945

April 14, 1948

The application for review and redetermination of The Standard Oil Company, Cleveland, Ohio, an inter-county corporation, from an increased personal property tax assessment for the year 1945, after being duly heard, came on to be considered.

The Tax Commissioner being fully advised in the premises, finds that for the year 1945 assessment was made increasing the value of both personal property and in-

tangible property over and above that as listed by the applicant as to items and amounts as follows:

<i>Item</i>	<i>Amount of Increase</i>
1. Average inventory values	\$852,013.00
2. Net taxable credits	1,354,230.00

The Tax Commissioner finds that the average inventory values were increased by reason of the fact that applicant determined the values as listed under the "Life" or, last-in, first-out method, and by reason of such fact the values as listed and returned did not reflect true value and finds that the true value of said inventory for such [fol. 203] year is as reflected in the increased assessment and said assessment as to the values so determined is hereby affirmed.

The Tax Commissioner further finds that the increase in net taxable credits over and above those as returned by said applicant was due principally to the fact that the applicant deducted taxes and annuities in determining the net taxable credits as so listed and finds that the deduction thereof by the applicant was in error and such assessment as to the increase in net taxable credits is hereby affirmed.

The Tax Commissioner further finds that applicant listed watercraft (boats and barges) at the depreciated book values thereof in the amount of \$1,017,518 but finds that by reason of excessive reserves having been accumulated the true value of said property was in excess of that as returned and finds that the true value of boats and barges taxable in Ohio for 1945 was \$1,322,863.00.

Applicant did not file a claim for deduction with respect to said boats and barges at the time of making return, but in its application for review protested the assessment of said property on the basis that such property was not taxable in Ohio.

The Tax Commissioner finds that watercraft and aircraft belonging to persons residing in this state and not used in business wholly in another state are taxable in Ohio and orders that the true value of boats and barges in the amount of \$1,322,863.00 be reflected in the final assessment certificate hereinafter ordered.

The Tax Commissioner being further advised in the premises, finds that personal property of the applicant

other than boats and barges was listed, at less than the [fol. 204] true value thereof for the year 1945 in certain taxing districts, partially by reason of excessive reserves having been accumulated and partially by reason of applicant's failure to include in such listing, personal property in the process of construction and finds that the true value of personal property not returned by reason of excessive reserves was \$739,022.00 and that \$68,157.00 of such amount was personal property used in manufacturing and that \$57,865.00 was personal property used other than in manufacturing, and that the true value of personal property in the process of construction and not returned was \$41,716.00 for use in manufacturing and \$38,936.00 for use other than in manufacturing.

The Tax Commissioner further finds that applicant listed personal property in the amount of \$15,052,922.00 which was \$561,027.00 more than the net book value thereof and included in such listing in Cleveland district was machinery used in manufacturing consisting of a catalytic cracking unit.

Applicant in its review and redetermination and evidence submitted in support thereof maintains that in the valuation of its catalytic cracking unit the Tax Commissioner should make an allowance for excessive costs and also an allowance for the general inflated level of the cost index during the war emergency and further contends that, by reason thereof the true value of such unit is \$3,000,000.00 as of January 1, 1945. Applicant further contends that its boats and barges are not subject to personal property taxation under the Ohio laws.

The Tax Commissioner, being further advised in the premises, and consideration having been given to the claims made and evidence submitted by the applicant in support [fol. 205] of said application for said year, finds that there is no authority in law or in long established administrative procedure for recognizing increased costs due to price increases in the determination of true value of personal property used in business; and that the claim of applicant in this regard should be and hereby is denied.

The Tax Commissioner finds that applicant at the time of filing its return did not file a claim in writing as provided in Section 5389, General Code, with respect to its ma-

chinery and equipment to the effect that the net depreciated book value was in excess of true value.

The Tax Commissioner further finds that the catalytic cracking unit was assessed in excess of the true value thereof in the amount of \$988,000.00 by reason of allowable excessive costs and equipment not in use but that in view of the judicial determination (*Willys-Overland Motors, Inc. v. Evatt*, 141 O. S. 402) he is without jurisdiction to find a value below net depreciated book value and orders that the value of such property be reduced in the amount of \$561,027.00, being the amount that the machinery and equipment used in manufacturing in Cuyahoga County exceeded the net depreciated book value thereof, and it is ordered that final assessment certificate issue correcting the assessment in the amount so stated. In all other respects the assessment as to machinery and equipment is hereby affirmed and the Tax Commissioner finds that in the districts in which such incorrect listings were made or corrected herein, the true value of personal property used in manufacturing and used other than in manufacturing for such year, including boats and barges, was as follows:

[fol. 206]

USED IN MANUFACTURING

	Amended True Values
Allen County — Shawnee Twp. Sch.	\$ 794,961
— Lima	365
Cuyahoga County — Cleveland	10,977,441
Lucas County — Oregon Twp.	3,442,001

USED OTHER THAN IN MANUFACTURING

	Amended True Values
Cuyahoga County — Cleveland	1,328,712
Portage County — Randolph Twp.	6,306
— Suffield Twp.	49,338
Summit County — Franklin Twp. E. Sch.	15,650
— Franklin Twp. W. Sch.	44,266
— Green Twp.	34,656
— Springfield Twp.	15,836
Wayne County — Chippewa Twp.	18,436
Hancock County — Washington Twp. Arcadia SD	20,414
Allen County — Lima	42,502
Belmont County — Martins Ferry	19,301
Carroll County — Center Twp. Carrollton SD	211
Cuyahoga County — Cleveland	635,891
Fayette County — Washington C. H.	5,867
Gallia County — Gallipolis	11,701
Hamilton County — Cincinnati	251,219
Mahoning County — Youngstown	47,393
Muskingum County — Zanesville	9,859
Richland County — Mansfield	27,516
Summit County — Akron	124,678
Other Counties — Various	3,243,832

The Tax Commissioner, therefore, orders that final assessment be made for the year 1945 in conformity with and reflecting the findings herein.

Department of Taxation (Sgd.) C. Emory Glander,
Tax Commissioner.

(Duly Certified.)

[fol. 207] BEFORE BOARD OF TAX APPEALS

AMENDMENT AND SUPPLEMENT TO NOTICE OF APPEAL—Filed
October 18, 1948.

(Personal Property Tax Assessment for 1945)

(No. 14,381.)

The Standard Oil Company, appellant in the above case, hereby supplements the contentions made in its Notice of Appeal filed in the above case with the Board of Tax Appeals, and especially in the second assignment of error therein, by stating that it contends that its boats and barges, having a true value of \$1,322,863, should be eliminated from appellant's 1945 personal property tax assessment for the following two reasons:

1. The taxation of such boats and barges by the State of Ohio for the year 1945 would violate the statutes of Ohio, since the use of such boats and barges in waters within or bordering on Ohio was insubstantial; and

2. The taxation of such boats and barges by the State of Ohio for the year 1945, even if permitted by the Ohio statutes, would deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, since such boats and barges had no taxable situs in Ohio for such year.

The Standard Oil Company, an Ohio Corporation,
by McAfee, Grossman, Taplin, Hanning, New-
comer and Hazlett, its Attorneys, 1500 Midland
Building, Cleveland 15, Ohio, Tel: Cherry 2600.

[fol. 208] BEFORE BOARD OF TAX APPEALS

NOTICE OF APPEAL—Filed May 13, 1948.

(Personal Property Tax Assessment for 1946)

(No. 14,381.)

The Standard Oil Company; appellant herein, hereby gives notice of appeal to the Board of Tax Appeals from the final determination made by the Tax Commissioner of Ohio with respect to the application of appellant for review and redetermination of an increased personal property tax assessment for the year 1946, said application being Case No. 3,276 before the Department of Taxation of Ohio. A true copy of the notice sent by the Tax Commissioner to appellant of said final determination is attached hereto as Exhibit 'A' hereof and incorporated herein by reference.

The errors in said final determination of the Tax Commissioner herein complained of, are as follows:

1. The Tax Commissioner erred in not granting in their entirety the applications filed by appellant for review and redetermination with respect to its 1946 Inter-county personal property tax return on February 5, 1947, and March 12, 1947.

2. The Tax Commissioner erred in holding that there is no authority in law or administrative procedure for allowing deductions for the inflated level of general construction costs incident to the war and its aftermath in the valuation for tax purposes of machinery and equipment built during the war years.

3. The Tax Commissioner erred in making an inadequate allowance for wholly excessive costs, and for peacetime inutility of equipment constructed for war purposes, in [fol. 209] his valuation for tax purposes of appellant's catalytic cracking unit at Cleveland for the tax year 1946.

4. The Tax Commissioner erred in holding that the true value of appellant's Cleveland catalytic cracking unit as of January 1, 1946, was in excess of \$3,000,000.00.

5. The Tax Commissioner erred in failing to eliminate from appellant's 1946 personal property tax assessment towboats and barges, having a true value of \$1,303,

907.00, and in holding that said boats and barges were taxable in Ohio.

6. The Commissioner erred in including any machinery in process of construction in the assessment of appellant's tangible personal property for 1946.

7. Even if machinery in process of construction were properly includible in appellant's personal property assessment for 1946, the Tax Commissioner erred in not valuing it for such year as idle equipment, at not more than 10% of its cost—that is, at \$92,868.00, instead of \$928,686.00.

8. Even if machinery in process of construction were properly includible in appellant's personal property tax assessment for 1946, the Tax Commissioner erred in not valuing it on the average value basis referred to in Section 5386 of the General Code.

9. The Tax Commissioner erred in failing to reduce the amended true value as of January 1, 1946 of personal property of appellant used in manufacturing in Cleveland, Cuyahoga County, to \$7,082,711.00; in failing to reduce the amended true value as of January 1, 1946 of personal property of appellant not used in manufacturing, in Cleveland, Cuyahoga County, to \$711,063.00; and in failing to reduce the amended true value as of January 1, 1946 of personal property of appellant in the other taxing districts listed in said final determination at figures excluding the values of property in process of construction in each such taxing district, which values are listed in Schedule 4 attached to appellant's letter to appellee dated October 31, 1947.

10. The Tax Commissioner erred in finding that appellant "failed to list" personal property of any of the types referred to in said final determination, other than property in process of construction which appellant has always contended is not subject to taxation.

This appeal is on questions of law and fact.

The Standard Oil Company, an Ohio Corporation,
by McAfee, Grossman, Taplin, Hanning, New-
comer & Hazlett, its Attorneys, 1500 Midland
Building, Cleveland 15, Ohio, Tel: CHerry 2600.

May 12, 1948.

[fol. 211] EXHIBIT 'A' TO NOTICE OF APPEAL

Department of Taxation of Ohio

No. 3276

In the matter of the application for review and redetermination of THE STANDARD OIL COMPANY, Cleveland, Ohio (Inter-county) for the year 1946.

April 13, 1948

The application for review and redetermination of The Standard Oil Company, Cleveland, Ohio, an inter-county corporation, from an increased personal property tax assessment for the year 1946, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that as to the year 1946 said applicant filed its return and thereafter increased assessment was made for such year and that such assessment reflected increases over and above those as returned by said applicant in the following respects:

Item	Amount of Increase
1. Average inventory values	\$ 935,314.00
2. Net taxable credits	1,567,900.00

The Tax Commissioner finds that the average inventory values were increased by reason of the fact that applicant determined the values as listed under the "Life" or, last-in, first-out method, and by reason of such fact the values as listed and returned did not reflect true value and finds that the true value of said inventory for such year is as reflected in the increased assessment and said assessment as to the values so determined is hereby affirmed.

[fol. 212] The Tax Commissioner further finds that the increase in net taxable credits over and above those as returned by said applicant was due principally to the fact that the applicant deducted taxes and annuities in determining the net taxable credits as so listed and finds that the deduction thereof by the applicant was in error and such assessment as to the increase in net taxable credits is hereby affirmed.

The Tax Commissioner further finds that applicant listed machinery and equipment in Cuyahoga County for the year 1946 in the amount of \$4,082,711.00 and that thereafter amended assessment certificate was issued in which the value of the machinery and equipment was increased over and above that as returned in the amount of \$6,916,129.00, such increase being due to the failure of the applicant to list machinery and equipment consisting of a catalytic cracking unit; such unit having been fully reserved on the books of the applicant. Applicant also failed to list personal property with a true value of \$741,979.00 by reason of excessive reserves having been accumulated and of which \$938.00 was used in manufacturing and \$163,868.00 was used other than in manufacturing and \$577,173.00 was boats and barges. Applicant also failed to list personal property with a true value of \$928,686.00 which was in the process of construction of which \$904,651.00 was to be used in manufacturing and \$24,035.00 was to be used other than in manufacturing.

At the time of filing its return, applicant filed a claim for deduction from book value in words and figures as follows:

[fol. 213]		Schedule 2
"Cleveland City, Book Value		\$3,142,425.00
Totals	Book Value	3,142,425.00
	Deduction Claimed	—
	Claimed True Value	6,991,741.00

"The depreciated book value figure of \$3,142,425 given in Item 1 represents the depreciated book value of the Cleveland Refinery machinery and equipment shown on Schedule 2 of the return and includes the Catalytic Cracker (Houdry unit) at Cleveland at a book value of ZERO, for the reason that the book value of this unit through depreciation (including amortization) was reduced to ZERO by January 1, 1946. Should the depreciated book value of this Houdry Unit be properly deemed higher than ZERO within the meaning of G. C. 5389, then the figure of \$3,142,425.00 is to be treated as increased by such excess over ZERO, and the deduction claimed shall be not ZERO, but the

excess of such increased figure over the true value of the refinery personalty of \$6,991,741 above mentioned.

"The supporting data with respect to the above claim are already in the possession of the Department of Taxation.

"Statement Forming Part of the Return

"In connection with the return to which this is attached we wish to call attention to the fact that the return shows a total true value for the Cleveland Refinery machinery equipment in Schedule 2 of \$3,991,741. This amount should be increased by \$3,000,000 to reflect and include the true value of the Houdry unit above mentioned, bringing the aggregate true value of Schedule 2 to \$6,991,741.00."

Applicant maintains that in the valuation of its catalytic cracking unit the Tax Commissioner should make [fol. 214] an allowance for excessive costs and also an allowance for the general inflated level of the cost index during the war emergency and further contends that by reason thereof the true value of such unit is \$3,000,000.00 as of January 1, 1946. Applicant further contends that its boats and barges are not subject to personal property taxation under the laws of Ohio.

The Tax Commissioner, being further advised in the premises, and consideration having been given to the claims made and evidence submitted by the applicant in support of said application for said year, finds that there is no authority in law or in long established administrative procedure for recognizing increased costs due to price increases in the determination of true value of personal property used in business; and that the claim of applicant in this regard should be and hereby is denied.

The Tax Commissioner further finds that in the amended assessment certificate heretofore issued the catalytic cracking unit was assessed in excess of the true value thereof in the amount of \$932,360.00 by reason of allowable excessive costs and equipment not in use and finds that the true value of said catalytic cracking unit as of January 1, 1946 was \$5,983,769.00 and further finds that boats and barges were properly assessed as having a taxable

situs in Ohio and likewise finds that there was no error in the assessment of the personal property which taxpayer failed to list by reason of excessive reserves having been accumulated and further finds that there was no error in the assessment of personal property in the process of construction and the assessment as heretofore made as to such property is hereby affirmed.

[fol. 215] In view of the foregoing, the Tax Commissioner finds that in the districts in which such incorrect listings were made, the true value of personal property used in manufacturing and used other than in manufacturing for such year, including boats and barges, is set forth as to amounts in the districts in the schedule below:

USED IN MANUFACTURING

	Amended True Value
Allen County — Shawnee Twp. Shawnee R.S.D.	\$ 778,163
Cuyahoga County — Cleveland	10,960,267
Lucas County — Oregon Twp.	3,226,760

USED OTHER THAN IN MANUFACTURING

	Amended True Value
Cuyahoga County — Cleveland	\$ 4,324,493
Portage County — Randolph Twp.	5,701
— Suffield Twp.	44,883
Summit County — Franklin Twp. E. Sch.	14,301
— Franklin Twp. W. Sch.	43,859
— Green Twp.	31,478
— Springfield Twp.	14,169
Wayne County — Chippewa Twp.	16,618
Hancock County — Washington Twp. Arcadia R.S.D.	49,013
Cuyahoga County — Cleveland	670,989
— Brecksville	5,803
— Euclid	11,049
— Chagrin Falls	5,607
Defiance County — Defiance	3,040
— Hicksville	3,792
Fairfield County — Lancaster	7,741
Franklin County — Columbus	112,936
Fulton County — Wauseon	3,003
— Fayette	2,722
Geauga County — Chardon	3,307
Hamilton County — Cincinnati	239,683
Henry County — Napoleon	3,839
Jefferson County — Steubenville	15,477
Lake County — Painesville	8,118
Lawrence County — Ironton	6,732
Lucas County — Maumee	6,273
— Toledo	161,704
Ross County — Chillicothe	8,715
Scioto County — Portsmouth	64,615
Summit County — Akron	114,858
Williams County — Bryan	4,381
Wood County — Grand Rapids	4,666

The Tax Commissioner further finds that in all other respects the assessment as heretofore made is correct [fol. 216] and it is ordered that final assessment certificates issue reflecting the above findings.

Department of Taxation (Sgd.) C. Emory Glander,
Tax Commissioner.

(Duly certified.)

[fol. 217-225] BEFORE BOARD OF TAX APPEALS

AMENDMENT AND SUPPLEMENT TO NOTICE OF APPEAL—(Filed
October 18, 1948)

(Personal Property Tax Assessment for 1946)

(No. 14,381)

The Standard Oil Company, appellant in the above case, hereby supplements the contentions made in its Notice of Appeal filed in the above case with the Board of Tax Appeals, and especially in the fifth assignment of error therein, by stating that it contends that its boats and barges, having a true value of \$1,303,907, should be eliminated from appellant's 1946 personal property tax assessment for the following two reasons:

1. The taxation of such boats and barges by the State of Ohio for the year 1946 would violate the statutes of Ohio, since the use of such boats and barges in waters within or bordering on Ohio was insubstantial; and

2. The taxation of such boats and barges by the State of Ohio for the year 1946, even if permitted by the Ohio statutes, would deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, since such boats and barges had no taxable situs in Ohio for such year.

The Standard Oil Company, an Ohio Corporation,
by McAfee, Grossman, Taplin, Hanning, New-
comer, Hazlett, its Attorneys, 1500 Midland
Building, Cleveland 15, Ohio, Tel: Cherry 2600.

[fol. 226] BEFORE BOARD OF TAX APPEALS

PROCEEDINGS AND TESTIMONY

(Nos. 12,488, 14,381 and 14,514.)

Taken before William J. Ford, Examiner, Board of Tax Appeals, in their hearing room, State Office Building, Columbus, Ohio, on October 18th, 1948.

APPEARANCES:

Mr. Isador Grossman and Mr. Rufus S. Day, Jr., on behalf of the appellant; Honorable Hugh S. Jenkins, Attorney General, by Mr. Darronne Tate, Assistant Attorney General, on behalf of the appellee.

Monday Morning Session, October 18th 1948.

Mr. Ford: Before the Board of Tax Appeals, Department of Taxation of Ohio, Standard Oil Company, Cleveland, Ohio, appellant against C. Emory Glander, Tax Commissioner of Ohio, Case No. 12,488. Appeal filed herein under date of January 29th, 1947, from an order of the Tax Commissioner under date of December 30th, 1946, making a final determination and certification with respect to appellant inter-county personal property tax returns for the tax year 1943 and '44, and with respect to the final assessments of appellant's personal property for said tax year.

Standard Oil Company, Cleveland, Ohio, against C. Emory Glander, Tax Commissioner of Ohio, Case No. 14,381. There are two appeals in this case, (1) appeal filed herein under date of May 13th, 1948, from a final order of the Tax Commissioner, under date of April 14th, 1948, acting upon an application for review and re-[fol. 227] termination theretofore filed by the appellant, as an inter-county corporation with respect to an increased personal property tax assessment made against the appellant for the tax year 1945. (2) Appeal filed herein under date of May 13th, 1948, from a final order of the Tax Commissioner, under date of April 13th, 1948, acting upon an application for review and redetermination of the appellant, as an inter-county corporation, with re-

spect to increased personal property tax assessment made against the appellant for the tax year 1946.

The Standard Oil Company, Cleveland, Ohio, appellant, against C. Emory Glander, Tax Commissioner of Ohio, appellee, Case No. 14,514. Appeal filed by the Standard Oil Company, appellant herein, from a purported final assessment certificate of valuation for the tax year 1945, issued by the Tax Commissioner on May 19th, 1948, with respect to the tangible personal property of the appellant in Cuyahoga County, Ohio.

Cases heard before William J. Ford, Examiner, at the hearing room of the Board, Columbus, Ohio, October 18th, 1948.

Counsel for the appellant will enter their appearances by name and by office address.

Mr. Grossman: Isador Grossman and Rufus S. Day, Jr., 1500 Midland Building, Cleveland.

Mr. Ford: You may enter your appearance, Mr. Tate.

Mr. Tate: Hugh S. Jenkins, Columbus, Attorney General, Darrone R. Tate, Assistant Attorney General, representing the Tax Commission.

Mr. Ford: Mr. Day, you may state in the record the agreement of counsel with respect to the consolidation of these cases.

[fols. 228-231] Mr. Day: I may state that it is agreed between counsel in this case that the three cases above referred to are consolidated and that all evidence introduced on this hearing be regarded as introduced on all three cases, is that satisfactory, Mr. Tate?

Mr. Tate: Insofar as is pertinent thereto.

Mr. Day: Insofar as it is pertinent thereto.

Mr. Tate: It may be so agreed on behalf of the Tax Commissioner.

Mr. Ford: You may proceed.

Mr. Day: Now, it seems to me that since these three cases all contain some common issues that it might clarify things for me to make a brief statement as to what is involved in the three cases, and after that I will state in what order I intend to proceed.

[fol. 232] Now, the second issue for 1945 and '46 is the taxability in Ohio, under the statute and under the Con-

stitution, of the boats and barges owned by the Standard Oil Company.

Mr. Ford: Is that with respect to all of the tax years?

Mr. Day: 1945 and '46 only, with respect to the boats and barges, owned by the Standard Oil Company, and used on the Ohio River system.

In that connection, we have two contentions on the boats and barges. The first is that while there is no question they were owned by an Ohio company, that nevertheless, their use in waters adjacent to Ohio was so insubstantial that they should not be regarded as taxable in Ohio under the statute.

The second contention is that even if they are regarded as taxable in Ohio, under the statute, nevertheless their taxability at their full value in Ohio would be a deprivation of the company property without due process of law, under the Fourteenth Amendment of the United States Constitution, because there is no jurisdiction to tax in Ohio.

As a second contention, now I want to say that we made those contentions orally before the Tax Commission, but here at this time, since we first have a quasi judicial tribunal that is authorized to pass upon a constitutional contention, I wish to file a supplement to our notice to appeal, which states these two contentions; for the purpose of the record, so that they will be clearly before the Board.

Mr. Ford: Any objection to the proposed amendment? [fol. 233] Mr. Tate: Let me look at the amendment first.

Mr. Day: I have three documents here because one is for the 1945 part of the first appeal, one for the 1946 part of the first appeal, and the second for the last appeal.

Mr. Tate: Let me ask counsel, for the purpose of the record, if I understand that this is merely an elaboration of the former plaintiff assignment of error.

Mr. Day: That's right.

Mr. Tate: Under those circumstances, there is no objection to the filing of the supplement to the notice of appeal.

Mr. Day: Let me state to Mr. Tate in detail.

Mr. Ford: Is that a supplement or an amendment?

Mr. Day: It is a supplement. In our original assignment

of errors, in these cases, we merely stated that these boats and barges were not taxable in Ohio. We doubted the right of the Tax Commissioner to pass upon the constitutional question. Now, for that reason, now, that we are before a quasi judicial tribunal that has a right to pass upon that type of question, we wish to file a supplement to the assignment of error, which states that we have both a statutory ground and a constitutional ground for our contention relating to the boats and barges.

(Discussion had off the record.)

Mr Ford: Upon request of counsel for the appellant, and without objection, appellant is given leave to file an amendment and supplement to its notice of appeal in case No. 14,381, with respect to the personal property tax assessment of the appellant for the tax year 1945. Upon application of counsel for the appellant, and without [fols. 234-236] objection, the appellant is given leave to file an amendment and supplement to its notice of appeal in Case No. 14,381, with respect to the personal property tax assessment against it for the tax year 1946.

[fol. 237] Mr. Day: On the question on the issue of boats and barges, it might be helpful for me to indicate very briefly why this issue is being raised in this way at this time. I am not going into detail on it, but I think there may be some factors here that may be of interest to the Board.

Mr. Ford: Very Well.

Mr. Day: For a long time we raised no issue of the taxability of boats and barges in Ohio, but because in earlier years most of our boats were product boats which [fol. 238] moved mainly in waters adjacent to Ohio. We had very few boats in earlier years too, and because no other state was trying to tax our boats and barges. Under the decisions of the United States Supreme Court, with respect to jurisdiction to tax, it used to be pretty clear and so far as decisions on boats and barges are concerned, it still seems to be the case that the state of the domicile of the owner has jurisdiction to tax the full value of boats owned by that owner, and that no other state has any jurisdiction to tax the boats, regardless of where they are, unless the boats are, can be kept here, located entirely in a single state. Now, for

many years that was the law of the United States Supreme Court, and it wasn't challenged. In recent years, with some changes in the doctrine of the United States Supreme Court on jurisdiction to tax other things than boats, some of the states along the river had been contending that they ought to be able to tax a proportionate part of the value of any boats and barges, wherever owned, that go along their river shore line, proportionate, usually, to the number of miles of route that are along those shore lines as compared with the number of miles of route, of total shore line. Some of them instead of taking miles, say barrel miles, in other words, how many barrels moved over how many miles, when it comes to petroleum boats. A couple years ago the state of Kentucky started contending that our boats should be taxable by Kentucky on that sort of proportionate basis, even though we had paid a full tax to Ohio on those boats.

Now, for these years, 1945 and '46, we paid a full tax to Ohio for these boats and what we have in this case is that even though we paid tax on them, listed them, and paid tax on them, they should be excluded from the assessment. [fol. 239] On that point the fact of filing no 902 claim with respect to our 1945 assessments makes no difference, because we are not claiming a reduction in book value of boats and barges for any year. The parties are in agreement on the value of boats and barges, the question merely is, are they taxable in Ohio. We have paid a full tax to Ohio on boats and barges, but when Kentucky began trying to tax us on a pro rated basis, I may say those proceedings are not finished yet, and Louisiana started to attempt to tax other companies' boats and barges on a pro rative basis, they haven't gotten to us yet, but probably will, so in view of those things, we decided that we should appeal from the inclusion of the boats and barges in the Ohio assessment for these two years as against the possibility that the other states on the river might also succeed in taxing us for those years, so that we will have an appeal pending both from the Ohio assessment and the assessment of the river states, so that if necessary we can carry both cases to the United States Supreme Court and contend that certainly we only ought to be able to be taxed once on our boats and barges for one year, and not a total of twice.

Now, that was our fundamental reason for raising the issue of boats and barges for the years 1945 and '46, for the first time, even though we had reported them in our return and paid a tax on them.

Now, I may say that the true value of boats and barges including in our 1945 assessment, that is of January 1st, 1945, as \$1,322,863, of course, the assessed value would be 70% of that, because boats and barges are listed at 70% of their true value, for 1946, the true value of boats and barges included in our assessment is \$1,203,907. The [fol. 240] assessed value would be 70% of that, just as in the case of 1945, and as I said before our two contentions with respect to these boats and barges are first, statutory, second, constitutional. The statute in point is Section 5325, of the General Code, which provides that the term "personal property for tax purposes shall include every ship, vessel, boat, of whatever name or description used or designed to be used either exclusively or partially in navigating any of the waters within or bordered on this state." Now, on that point we expect the evidence to show that any use of the boats and barges here involved in the years in question in waters adjacent to Ohio was so insubstantial as to be negligible; that it shouldn't be taken into consideration for the purpose of rendering the boats taxable under this statute.

With respect to the constitutional point, our point is that, and the contention we are making is that jurisdiction to tax is lodged in the state in which these boats operate, not in Ohio, which is merely the state of the domicile and in which only an insubstantial part of the operation takes place. That, of course, is based upon the due process clause of the Fourteenth Amendment of the United States Constitution.

Now, let me say again there that our contention is contrary to the present decision of the United States Supreme Court with respect to boats and barges. We are making it, as I said, because we feel that in a case that is now pending in the United States Supreme Court, the United States Supreme Court may hold that jurisdiction to tax resides not in the domicile of the boat owner, but in the state in which it operates upon a prorogative basis. Now, I may also say in order to have no charge made of

[fol. 241] undue inconsistency in the Kentucky case we will be contending the other way, because what we are trying to do is to protect ourselves against being taxed twice for these years. Mr. Grossman points out the Kentucky authorities are contending that they have a right to go back several years and pick up back years. Now, with that preliminary statement, I would like to call our witness on this subject, Mr. Pattison.

And also: Henry William Pattison, called as a witness, being first duly sworn, testified as follows:

Examined by Mr. Day.

Q. Will you state your full name, please?

A. Henry William Pattison.

Q. Where do you live?

A. Cleveland, Ohio.

Q. Now, whom are you employed by, Mr. Pattison?

A. By the Standard Oil Company of Ohio.

Mr. Ford: How do you spell your name?

Mr. Pattison: P-a-t-t-i-s-o-n.

Q. How long have you been with the Standard Oil?

A. Since the spring of the year, 1946.

Q. In what capacity are you employed by the Standard at the present time?

A. As a staff assistant to the vice-president in charge of our transportation operations.

Q. Have you been in that position ever since you went with the company?

A. Yes, I have, sir.

Q. Does the transportation operation of the company, of which your department is associated, include the boats and barges of the company?

A. They do include the boats and barges.

[fol. 242] Q. Are you familiar with the operations and routes of the boats and barges of the company and with the records pertaining thereto?

A. I am familiar with the operations and with the records.

Q. Am I right in assuming that your company has two

classes of boats and barges, one dealing with crude oil operations and one with gasoline operations?

A. That is correct.

Q. Would you tell the Board in general what was the nature of the company's operations on its crude oil boats and barges during the years 1944 and '45?

A. The most substantial of the crude that had to be moved in those years on the river was crude that was made available to us at Memphis, Tennessee, and at Gibson Landing, which is on a little further south of Memphis, and those crudes in question had to be moved to principally two points of destination, one of them our refinery located at Bromley, which is just across the river from Cincinnati.

Q. How do you spell that?

A. B-r-o-m-l-e-y, which is just across the river from Cincinnati, four miles west, and to Mount Vernon, Indiana, which is the river terminus of our pipeline operations. And those movements from lower river point to Mount Vernon, Indiana, and to Bromley, Kentucky, represents the greatest bulk of the movements on the river in 1944 and '45. There are other movements, but they don't represent much, this represents the substantial volume that was handled.

Q. When you say lower river point, what do you mean?

A. In our overall picture there is crude made available to our company on various points on the river, so that our boats and barges can pick up and move to a pipeline with [fol. 243] an ultimate destination like Bromley through exchange arrangement with other companies, or in case of some of the major fields, for example, in Mississippi, we have a major source of crude, we have to make it available in river points, in the years in question it was Memphis, moved from the Pensley Field in Mississippi to Memphis by tank cars, and from Memphis on the river by boat, either to ultimate destinations of Mount Vernon, Indiana, or to Bromley, Kentucky. In other words, these lower river points in some instances we have our own crude, some instances we have crude which we get by reason of exchanges with other companies, that is from the termini of other major oil companies, I mentioned Gibson Landing.

Q. What state?

A. Louisiana, Gibson Landing being the terminus of Standard Oil of New Jersey, Buckhorne Landing was used by us at that time, being the pipeline terminus at that time of Sun Oil Company. Other points mentioned down there, Monroe, Aimsville, and so forth, are all river termini.

Q. Are those in Louisiana?

A. Louisiana, being river termini of other oil producers, which are making crude available to the river for distribution wherever it might go.

Mr. Day: Please mark this Appellant's Exhibit No. 1.

(And thereupon the paper last above referred to was marked for purposes of identification as Appellant's Exhibit No. 1 by the reporter.)

Q. Mr. Pattison, I hand you Appellant's Exhibit No. 1, and ask you what it is and what it shows?

[fol. 244] A. Exhibit 1 shows the miles of river, major middle west river transportation facilities of water deep enough to handle tow boats and barges, the kind we operate, principally the Mississippi and Ohio Rivers, and we have indicated on here the principal river terminal by name, also shown on here is the mileage as represented in terms of so many miles below Pittsburgh, being the number zero mileage on the river for purposes of identification and we have indicated in red the Mississippi and Ohio Rivers are those rivers used by our tow boats and barges for the movement of crude oil, with one exception, as you notice that the river is colored red as far as or approximately Cincinnati, the Bromley area. We had in 1944 occasion to carry one movement, one of the crude movements to Catlettsburg, which I don't know that this map shows, it is about midway between Indiana and Pennsylvania, on the Ohio River, about half of the overall Ohio River mileage.

Q. There was one movement in that year?

A. One movement in that year with that.

Q. Catlettsburg is in Kentucky?

A. Catlettsburg is in Kentucky, the Ashland Oil and Refinery Company. With that exception, as I mentioned before, the movements are principally confined from some

of these lower river points in Louisiana, Arkansas, for example, Gibson Landing, Memphis, on up to the "Y" at the junction of the Mississippi and Ohio Rivers, from those points on east and north to Mount Vernon, Indiana. Mount Vernon is on the river at the junction of the Illinois and Indiana line, that being our principal pipeline connection and on further east and north to Bromley, Kentucky, and the location of the LaTonia Refinery.

[fol. 245] Q. Now, Mr. Pattison, then does this red line on your map indicate that the southernmost point of your operation of your boats and barges on the Ohio, Mississippi system was a place in Louisiana near Baton Rouge?

A. That's right, I think that perhaps more important is the fact that the greatest bulk of the movement, most southernly point of the greatest bulk of the movement was Gibson Landing and with the exception of the isolated movement further south, and no further north than Bromley.

Q. Now, the northernmost point of your movement of your crude oil boats and barges, except for the one trip to Catlettsburg, which you mentioned in 1944, was Bromley?

A. Bromley, that's right, sir.

Q. And Bromley, which is in Kentucky, is at the top end of this red line, is it not?

A. That's right, sir.

Q. Do you know, Mr. Pattison, what boat it was that made the trip up to Catlettsburg in 1944?

A. I will have to check my notes, I believe either the Atlas or Renown.

Q. Will you check that, please?

A. The steamer Renown, yes.

Q. It was the steamer Renown?

A. Yes.

Q. Does the company still own the steamer Renown?

A. No, the steamer Atlas and steamer Renown, the two vessels were considered highly inefficient and they were very much so, we had to use them during the war, we didn't have anything else, and they were disposed of as soon as we were able to get equipment, either additional

tows purchased by our company or were able to lease more efficient facilities from someone else.

Q. Do you know when they were disposed of by the company?

A. I think the latter part of 1944, I don't remember the exact date.

[fol. 246] Q. Mr. Pattison, does all of the crude oil that is moved by your boats and barges on this river system go as far as Bromley?

A. No, not by a long shot. I'd say perhaps the greatest majority only goes as far as Mount Vernon, Indiana, into the pipeline terminus. The per cent I would have to check my figures, perhaps as much as 40% goes to the destination of Mount Vernon.

Q. Now, you say Mount Vernon, you mean Indiana?

A. Mount Vernon which is located on the river roughly at the junction between the boundary lines of the states of Illinois and Indiana.

Q. Do you have a pipeline from Mount Vernon to your Ohio refinery?

A. We have a pipeline which begins at Mount Vernon termini and which runs north for a distance of thirty or forty miles, at which time it joins the pipeline of the Ohio Oil Company. The crude oil moves into the pipeline of the Ohio Oil Company up to a point called Stowe, Illinois, at which point it moves into the line of the Sohio Pipeline Company which is a subsidiary of the Standard Oil of Ohio, moves from the lines of the Sohio Pipeline by one of two means, either one line to Lima, Ohio, or to another line over to Mantua, Ohio, which is close to Cleveland, and on those movements that go through the line to Lima, Ohio, they join the junction with the Buckeye Pipeline for movement on to Cleveland or to Toledo.

Q. Are the routes of those pipelines also shown on the map?

A. They are also shown, on the map, the route of the pipelines.

Q. Do I understand that a good part or most of the oil that comes up the river at Mount Vernon, Indiana, goes up to those pipelines?

A. That is correct, sir.

[fol. 247] Q. Then, Mr. Pattison, you have stated that in the year 1944, up to a date in the latter part of that year, when you disposed of them, you had two boats named the Atlas and the Renown, what other boats did you have operating in crude oil service on the Ohio River and Mississippi River during these years 1944 and 1945?

A. We had two motor vessels or Diesel vessels, as we call them, our biggest one and most efficient tow boat being Sohioan and the second boat, somewhat smaller capacity, a tow boat, the Sohio-Memphis, and then we also had two of the so-called Defense Plant Corporation boats which were built, twenty odd boats were built during the war, which were leased to major operators, two of them we were using at that time, formerly the BouArada, now called the steamer Sohio Fleetwing, and the Coral Sea, steamers, 2000 horsepower steamboats built by the Defense Plant Corporation and leased to the various major companies on the rivers for hauling. We used some of those during the war and later when they were put up for sale we acquired two of them.

Q. Now, have you named all of the boats that the company had in crude oil service in the years 1944 and 1945?

A. The two steamers, the Coral Sea, and the Sohio Fleetwing or formerly the BouArada, the two motor vessels, the Sohioan, and the Sohio-Memphis, and the ones we mentioned, the Atlas and the Renown, that was disposed of in 1944.

Q. Except for the Atlas and the Renown, were these boats all owned by the company during the entire year 1944 and '45?

A. No, they were not. The only ones entirely owned by the company in 1944 and '45 were the two boats, the Sohioan and Sohio-Memphis, plus the Atlas and the Renown, [fol. 248] and the other two boats, steamers from the Defense Plant Corporation, which were leased to the various companies. We also leased these boats.

Q. When were those boats acquired, when was the ownership of those boats acquired by your company as distinguished from the leasing of those two boats?

A. The two, the 2000 horsepower steamers, were acquired, the one I would have to check the exact date, I am not posi-

tive, perhaps Bill can answer that question, the steamer, the Sohio Southern or the former Midway Island was acquired in 1946, if my memory is correct.

Q. I am limiting it to the boats owned in 1944 and '45, the Coral Sea?

A. The Coral Sea, I believe, was acquired in 1945, I will have to check that.

Mr. Ford: In that connection, there is no question here with respect to identity or valuation of the boats and barges owned by the appellant company on taxing day in 1945 and taxing day 1946, but that whole question is one of jurisdiction.

Mr. Grossman: One of jurisdiction and one of the interpretation of the Ohio statute.

Mr. Ford: Yes, Mr. Day did say that too.

Mr. Day: There are two somewhat claritory questions I would like to ask.

Q. You said a little while ago that certain boats were the only ones entirely owned during the year, did you mean by that these were the ones that were owned the whole of those years, or did you mean there were some other boats which you had a part interest in during these years?

A. No, I obviously confused everybody, I mean to say that when we lease a boat from either the Defense Plant Corporation or from some independent operator on a so-called bare boat basis, it is the practice of the industry [fol. 249] that the operator supplies the crudes and provisions and fuel, and take over, it operates 100%, so in a sense I confused you, we look at that as almost in the sense of ownership, perhaps, and actually operate the boats and pay rent all for the use of that. In that category are the two boats, the BouArada and the Coral Sea. We don't own them, the Defense Plant Corporation owns them.

Q. When did you acquire them?

A. Mr. Kall tells me the purchase was made on the one December, 1945, and the other in June, 1946.

Q. Which is which?

A. The Sohio Southern or Midway Island was acquired in 1946 and the BouArada or presently called Sohio Fleetwing was acquired in December, 1945. Those dates Mr. Kall has told me.

Q. The M. V. Sohio was owned by the company during the entirety of those years?

A. That is correct; that's right.

Q. Is that true of any other boat?

A. That is true of the Sohio-Memphis.

Q. And the Atlas and Renown were owned by the company but were sold by the company some time during 1944, is that right?

A. That is correct.

Q. Can you tell us the approximate date in the case of both boats?

A. I had shown on these sheets the record had indicated that it was in October, 1944.

Q. Both boats were sold?

A. Yes.

Q. Now, are there any other boats in crude oil service in the years 1944 and '45, which the company owned?

A. Yes, there was one very small one, the Sohio Mount Vernon, I believe we called it at that time, which was a little 200 horse power terminal boat just used for pushing barges around, and spotting them in their berths, and [fol. 250] so forth, for loading and unloading, is all. That is all that were in crude service.

Q. Mr. Pattison, are there any other boats which during either of these years, 1944 or '45 the company had a part interest in as distinguished from complete ownership?

A. No boats that I know of that the company had a part interest in. There was a product boat, the Sohio, we haven't discussed it, the Atlas and Renown were totally and completely owned by Standard and the Sohio-Memphis, the balance have been leased to us.

Mr. Day: Please mark this Appellant's Exhibit No. 2.

(And thereupon the paper last above referred to was marked for the purpose of identification Appellant's Exhibit No. 2 by the reporter.)

Mr. Day: I think perhaps before going any further, we will offer into evidence Appellant's Exhibit No. 1.

Mr. Tate: No objection.

Mr. Ford: Upon request of counsel for the appellant,

Appellant's Exhibit No. 1 offered in evidence and received.

(And thereupon Appellant's Exhibit No. 1 was offered and admitted in evidence.)

Q. Mr. Pattison: I hand you Appellant's Exhibit No. 2, was this exhibit prepared by you?

A. This exhibit was prepared by me.

[fol. 251] Q. Would you tell the board in detail what the exhibit shows?

A. I will be glad to. We have attempted to list here during each of the years in question, 1944 and '45, all of the movements in terms of barrels and barrel miles, which is commonly used by industry, which were accomplished by the individual boats, either under our ownership or under our control during those years. For example, look at the top line in the year 1944, we moved from Cairo, now Cairo is at the junction of the Ohio and Mississippi River to Mount Vernon, Indiana, which is our pipeline terminus, a movement of 151 miles, under the steamer Atlas delivered 6083 barrels, reading from left to right again. Take the first line, for example, the movement from Cairo, Illinois, to Mount Vernon, Indiana, Cairo, Illinois, being located here at the junction of the Mississippi and the Ohio Rivers is called the first point on your map or the Y, at an actual distance of 151 miles movement from the junction of the river to the boundary line from the Illinois and on the river, you see a terminal called Mount Vernon, following that across we have three columns listed under each tow boat, take the steamer Atlas, for instance, shows barrels from Cairo, Illinois, to Mount Vernon, Indiana, 6083 miles in terms of barrels, times the miles, the total barrel miles is the second amount, the Ohio is zero, and go down the second one, that is more appropriate, Gibson Landing, second line, which is way down here in Louisiana, to Bromley, Kentucky, which is right across the river from Cincinnati, being an actual 1292 miles, 17½ miles operated in Ohio.

Q. Let me ask you, if I may interrupt to ask a question, Mr. Pattison, will you tell us, when you talk of operated in Ohio, and refer to your table to operated in [fol. 252] Ohio waters, what do you mean?

A. I mean that the tow boat moved in waters on the Ohio River adjacent to the state of Ohio, from the distance from Indiana to Ohio boundary line to Bromley. It operated on the Ohio River from the boundary line of the Ohio and Indiana up so far as Bromley.

Q. That was 17½ miles?

A. 17½ miles.

Mr. Ford: Please read that answer back.

(Answer read.)

Q. Now, Bromley is in Kentucky?

A. Bromley is in Kentucky.

Mr. Ford: What was the occasion of getting over on the Ohio waters at all?

The Witness: There isn't any occasion to get into the Ohio waters, what I meant to say, the boat is moving on the Ohio River between the states of Ohio and Kentucky from the boundary line of Indiana and Ohio to Bromley, Kentucky.

Mr. Day: In other words, Mr. Ford, I want to clarify the ambiguity in the term on the chart with reference to Ohio waters. In other words, that merely means on this chart movement in a part of the Ohio River that is along Ohio.

Mr. Ford: As between Ohio and some other state?

The Witness: No, between Kentucky, well, the movement is from a place down the river up to Bromley, Kentucky.

Mr. Ford: Yes, through a part of the river that is between the Ohio shore and the Kentucky shore, is that correct, Mr. Pattison?

The Witness: That is correct.

Mr. Day: As Mr. Grossman is stating, the reference to Ohio waters then is not referring to waters that are [fol. 253] legally within the boundary limits of the state of Ohio, as I understand the state of Ohio begins only on the low water mark on the Ohio side? The only reference is to waters of the Ohio River and a place which is between an Ohio shore and a Kentucky shore.

Mr. Ford: Is that the way the witness understands it?

The Witness: That is the way I understand it.

Mr. Ford: We will recess at this time for the noon hour, and we will come back at 1:30.

(And thereupon a recess was had until 1:30 of same day.)

Monday Afternoon Session, October 18th, 1948.

Mr. Ford: You may proceed with the witness.

And also: Henry William Pattison, being recalled testified as follows:

Examined by Mr. Day.

Mr. Day: Before returning to this, Appellant's Exhibit No. 2, I want to make one remark which may clarify things and I want to ask one other question. The remark is this, that the reason we have been talking here about the use of these boats and barges included all service in the years 1944 and '45 is that we are dealing with the value as of January 1st, 1944, and January 1st, 1945.

Mr. Ford: That's right.

Mr. Day: And the taxability presumably depends upon the use in the years that end, because using the year that follows then is not known at that time.

Mr. Ford: It is so understood.

Mr. Day: Very well.

[fol. 254] Q. Mr. Pattison why do these boats and barges include oil service used in waters adjacent to Ohio at all?

A. Well, there are only two ways to get crude oil to our LaTonia Refinery.

Mr. Ford: What refinery?

The Witness: LaTonia Refinery is in the Cincinnati area on the Kentucky side, close to Bromley. Bromley is the pipeline terminus at the river. The river terminal, there are only two ways to get to the LaTonia Refinery, one by river, and the other by pipeline, through a pipe owned by the Ohio Oil Company. It has always been a matter of economics with us for the manner selected of getting the crude to the refinery, delivered to the refinery. The delivery is the most important criterion with the exception of certain times during the war, you had to do certain things when you had no other choice, but during these

years we were using the river fleet equipment on the river to deliver crude to the refinery through the Bromley terminal by boat and barge, not by pipeline, principally dictated by economics.

Q. Was that the only reason during these years 1944 and '45 why you moved these boats and barges into the part of the Ohio River adjacent to Ohio?

A. To the best of my knowledge, that is the only reason.

Q. How far is it from the Ohio border to Bromley, which is the port for your LaTonia Refinery?

A. I don't have any official coast guard mileages to give you, the best I could get was an estimate from maps that we had available as to the distance, and my estimate was 17½ miles, it is very close to it, maybe 17¾ or 17.4, something of that kind.

Q. In addition to the refinery in LaTonia and in Kentucky your companies had certain other refineries?

A. Have refineries.

[fol. 255] Q. Where are they located?

A. Lima and Toledo, and at Cleveland, Ohio.

Q. Is crude oil that is destined to those refineries shipped up the river too?

A. No, there is no way to ship it up the river, I should say there are no connections, no pipeline connections with the river in the Ohio area. Therefore, we have to get crude to the Lima refinery and Toledo refinery through those pipelines which connect with the river. Now, our principal connection, as I mentioned before, is Mount Vernon, Indiana, we really had two alternatives, we have Wood River, I don't have a map to show you, the principal pipeline connects with the river, and our refineries through Wood River, which is St. Louis.

Q. Wood River, what state?

A. Missouri there is a connection that the Ohio Oil Company has, a pipeline connects between St. Louis and Lima, Ohio. We can move crude up to Lima and then through the Buckeye line to Cleveland and Toledo, or we have the other alternative of coming by river up the Mississippi to our Mount Vernon river landing, and moving into our pipelines at either Cleveland or Toledo.

Q. Do you have any pipeline connections with your Ohio refineries that connect with the river in Ohio?

A. We do not.

Q. They are all further south and west than Ohio?

A. We should qualify that a little bit, we do have some pipeline connections in Ohio, not crude, we do have some product lines.

Q. But these boats and barges in crude oil service bring nothing to go into these pipelines?

A. That's right, sir.

[fol. 256] Q. Aside from the operation in the 17½ miles of the Ohio River to get to Bromley and the LaTonia Refinery, did your boats and barges in crude oil service in the years 1944 and '45 operate in any other waters that were either in Ohio or adjacent to Ohio?

A. With the exception of the one isolated movement, which I mentioned to the Ashland Oil and Refinery Company at Catlettsburg Refinery, there was no exception to that, everything else went to Bromley. That is the ultimate destination being LaTonia.

Q. That was one made by the Renown?

A. Made by the Renown, and the Renown was sold in the fall of 1944.

Q. Now, to return to Appellant's Exhibit No. 2, would you proceed with your explanation of what this shows?

A. Well, let's take the second line here, the second line is designated Bromley movement from Gibson Landing to Bromley, Kentucky, which is a distance of 1,192 miles 17.5 miles of which is waters between the state of Ohio and Kentucky, from the Ohio, Indiana line to Bromley. You can see the first column is the steamer Atlas, she did not make any movement, you have to get over to the M. V. Sohioan, 92,760 barrels were delivered during that year at Bromley from Gibson Landing, multiply that number of barrels times mileage and we have a barrel mileage of 1,105,699 and the barrel miles in waters adjacent to Ohio of 17½ miles is 16,233, and similarly we can go across the line to the Sohio-Memphis, which delivered on that particular movement, and the Fleetwing and so forth, and then the last column on the page would be a summary total of all the boats, the total number of barrels would be 375,000

[fol. 257] barrels were delivered to Bromley, Kentucky, from Gibson Landing, or a total barrel miles of 4,471,310. Any question about that?

Q. Mr. Pattison, does this chart, Exhibit No. 2 show all of your movements from the years 1944, '45 and '46 of crude oil boats and barges?

A. There may be some confusion, when you say all of the movements, you take for example this line that we just looked at, Gibson Landing to Bromley, these figures don't indicate all made in one trip, that was made in more than than one trip.

Mr. Ford: We understand that.

The Witness: This 92,760 barrels, that happened to be one, the Memphis delivered 162,044 barrels, probably that was three trips.

Q. At least it shows a summary of the operations?

A. A summary of the operations that were made during that year, the total number of barrels delivered to each destination.

Q. For each of the three years?

A. For each of the three years. It does not indicate the number of trips for each boat.

Q. Does it also include all of the boats that you had operating in this service?

A. Includes all of the boats operating in that service.

Q. Are the facts and figures stated on this chart, Exhibit No. 2, accurate?

A. To the best of my ability, they are accurate figures as taken from the records of the company.

Q. Now, I note on Exhibit No. 2—

Mr. Ford: In connection, in response to a question of Mr. Tate, I believe, did you prepare them yourself from the records of the company, or were they prepared under your supervision?

A. I prepared a portion of them and some of them were [fol. 258] prepared under my supervision, sir.

Q. Now, I note that at the end of each year, 1944, '45, and '46, with respect to each boat and also with respect to the total, there appears certain per cents that range ap-

parently on this chart between 1 and 2%, what are those per cents?

A. They simply represent the per cent of the barrel miles moved in Ohio waters as we have indicated in each of these columns, in relation to the total barrel miles that were moved by the boats, but are involved in the particular page.

Q. When you say Ohio waters, what do you mean?

A. I mean moved on the Ohio River between that section of the river, which is between the state of Ohio and state of Kentucky, from the Indiana, Ohio boundary to Bromley, Ohio.

Mr. Day: At this point, I wish to offer in evidence Appellant's Exhibit No. 2.

Mr. Ford: Any objection?

Mr. Tate: No objection.

Mr. Ford: Upon request of counsel for appellant and without objection, Appellant's Exhibit No. 2 is admitted in evidence.

Q. Mr. Pattison, in what state are these boats registered?

A. They are registered in the state of Ohio.

Q. What does that mean?

A. It means they designate the home port of a document vessel as being Cincinnati, Ohio, in our case, that is the papers, but the home port of each of the two boats in question is Cincinnati, Ohio.

Q. Now, do these boats at any time go into Ohio ports?

A. They do from time to time go into Ohio ports.

[fol. 259] Q. Upon what type of occasion do they do that?

A. In those years under consideration when a boat discharged its cargo at Bromley, it from time to time on its down river trip to pick up another cargo might stop at Cincinnati. Might be for any number of reasons, might be minor repairs, call in an electrician, a welder, something of that kind for a couple of hours, pick up some provisions or might be to have the tow boats fueled.

Q. When major repairs were to be made; or the boats dry docked, where would that take place in the years in question?

A. To the best of my knowledge, no major repairs were ever accomplished at Cincinnati. The boats were dry

docked for scraping and painting, and things of that kind, it was done at Paducah, or St. Louis, or other down river points. It could have been accomplished at Cincinnati, but just as a matter of fact, it wasn't and also nowhere else in Ohio.

Q. Do you know these boats were registered from Cincinnati, from Ohio?

A. I don't believe I do, I think it could have been any place.

Q. You said that these boats from time to time called at Cincinnati when they were up on their Bromley trip for fuel or for provisions, or for minor repairs, did they also stop at other places for similar things?

A. At the southern end of the run, likewise, after a matter of ten days or two weeks had elapsed, they would have to fuel up or might fuel up at Louisiana, and provision up down there, or similarly, if they had any trouble, they might call in any repairman, anywhere along the river where some trouble might occur, as Memphis, or Wood-river or any other place where a repair yard was available, they would stop and take care of it.

[fol. 260] Q. And aside from these stops at Cincinnati, to have minor repairs, or to refuel, or to provision, were the boats ever laid up in Cincinnati in these years?

A. To the best of my knowledge, they were not.

Q. Now, so far, Mr. Pattison, you have testified with respect to the boats and barges of the company that were in crude oil service in the years 1944 and '45, is that right?

A. That's right, sir.

Q. At the beginning of your testimony, you stated that there were also some boats or a boat and barges that were in product service, would you tell us about that?

A. We had one boat, the tow boat Sohio operating at that time for the Standard Oil Company for the movement of product. She had three barges.

Mr. Ford. You mean finished product?

The Witness: Finished product, gasoline, kerosene, fuel oil and so forth. She had two barges regularly, 26,000 barrel barges, she normally moved from Bromley, as these products came out of the LaTonia Refinery. They were loaded in the barges of the tow boat Sohio, moved north

and east up to various towns like Sciotoville, East Liverpool and Steubenville, Marietta, and so forth, all of the various river terminals that we had. Also she loaded out of the other principal ports, which was Kenova, West Virginia, being the plant of the Ashland Oil and Refinery Company; but all of her movements were, I can't think of any exception, all of her movements were movements on the Ohio River between Ohio, the state of Ohio, and the states of Kentucky and West Virginia. In other words, movement on the Ohio along the river which was adjacent to the State of Ohio, 100%, with perhaps very few exceptions.

[fol. 261] Q. Is it part of the river that was transversed by your product service boat shown on Appellant's Exhibit No. 1?

Mr. Ford: Exhibit No. 1.

The Witness: Yes, it is on the map.

Q. How is it shown on that Exhibit No. 1?

A. We have distinguished that with a green pencil, as against the crude as shown in red.

Mr. Ford: I see.

Q. In the years in question were barges that were used with the crude oil boats always used with crude oil boats or sometimes used with the product boats?

A. To the best of my knowledge, they are always used with crude oil boats.

Q. And the ones that were used with the product boats, were they always used with the product boats?

A. To the best of my knowledge, they were always used with the product boats.

Mr. Ford: I don't believe I just understand that. Do I understand that the barges that were used in connection with the product boats were used exclusively on products, that is the barges were?

A. The barges, were, Mr. Ford, I think to the best of my knowledge, because in times gone by there has been instances, due to certain emergencies, this is since we have had to change clean barges to dirty barges. It is an expensive proposition and we don't make a habit of that.

Q. How many barges did you have in these years in the product service?

A. We had three barges.

Q. The rest of them were in the crude oil service?

A. The rest of them were in the crude oil service.

Q. On January 1st of 1945 and on January 1st, 1946, did the company intend to use its crude oil boats in any [fol. 262] manner different than it had been using them on the year ending on those dates?

A. No, sir, they didn't.

Q. At the time when the company acquired these boats, did it plan to use them in any different method from what it had used them?

A. No, sir, they did not.

Mr. Day: Your witness, Mr. Tate.

Cross Examination.

By Mr. Tate.

Q. Mr. Pattison, directing your attention to Appellant's Exhibit No. 1, would you state whether that exhibit shows mileage from any particular point to any other particular point? That is, does this exhibit purport to show the mileage from distant points to Bromley, Kentucky?

A. No, it does not show it.

Q. Now, in the preparation—

Mr. Ford: You mean Gibson Point, or Gibson Landing?

Mr. Tate: Gibson Landing.

The Witness: It shows them indirectly, Mr. Tate, the mileages are listed down there, so many miles south of Pittsburgh, you notice the figures on the map. In other words, you can pick up from the map the distance from Gibson Landing, let's say, to Bromley without reverting back to this relation to Pittsburgh.

Q. Now, just for my edification and by way of explanation, will you take for example Pittsburgh and show how the mileage is ascertained from Pittsburgh to any point on the Mississippi, for example, Gibson Landing?

A. Well, you take here it is for example, 70 miles below Pittsburgh, Steubenville, 90 miles below Pittsburgh, Mar-

tins Ferry, and then down the list, Sciotoville, 349 miles below Pittsburgh, and Bromley, 474 miles below Pittsburgh [fol. 263], burgh, and Owenboro, 757 miles below Pittsburgh, subtract 757; any one of the points, and the differential would be the mileage.

Q. Now, forgetting for the purpose of computing the mileages reflected by Appellant's Exhibit 2, was Pittsburgh used as a starting point?

A. No, it wasn't.

Q. Now, then, referring to Appellant's Exhibit No. 2, and directing your attention more particularly to column 3, which is headed "actual miles," and coming to column 4, which is headed "miles operated in Ohio waters," will you tell me, for example, the manner in which the figure 1192 shown under the column "actual miles," was ascertained?

A. There are two mileages on the river, I might give you, one is the coast guard light list mileage. Everybody in the industry uses the coast guard mileage, 42 volumes of it published, the Coast Guard puts out, which is called "Light List Mileages," they use that as a guide and Bible. It does not take into consideration, however, certain cut-offs, which the tow boats actually use on the Mississippi. That's what they call long mileages, the actual bends and turns in the Mississippi and in the calculation in barrel miles in performance which we in terms of performances we do not use the so-called light list. They indicate a mileage which is greater than that actually moved by a particular boat in question, so we have to take into consideration these so-called cut-offs, three or four of them, on the lower Mississippi, amounting to 1600 miles, which would alter the mileage as given at Coast Guard light lists, would shorten it.

Q. Which mileage did you use in the preparation of your Appellant's Exhibit No. 2.

A. We used the combination of two, Mr. Tate, we used [fol. 264] the Coast Guard light mileages from Pittsburgh on down to the junction of the Ohio and Mississippi to Birds Point, or Wyatt on the lower Mississippi, since cut-offs are a factor in performance of our boats, we included the cut-offs.

Q. Directing your attention to Exhibit No. 2, at the upper left-hand corner, and more particularly to line 3 over in the first column, which is indicated Gibson Landing, La., to Bromley, Kentucky, that mileage is shown?

A. 1,192.

Q. Do I understand that is the total mileage from Gibson Landing to Bromley?

A. That is correct.

Q. Next to the column, headed "Miles operated in Ohio waters," 17.5, that 17.5 is a part of the 1192?

A. That 17.5 is a part of the 1192.

Q. After that boat arrived at Bromley and discharged crude oil, what, if any, movement did it make from that point, if you know?

A. It turned around and went back to pick up another load.

Q. Would that boat normally go back empty or would it stop at any place and load anything?

A. In those years in question it normally went back empty, in all instances it went back empty.

Q. Now, would that be when you say those years, you mean particularly 1944 and '45, calendar years?

A. I mean particularly 1944 and '45 calendar years.

Q. I believe you testified on direct examination that the mileage from the Indiana-Ohio line to Bromley was approximately 17½ miles?

A. Yes, sir.

Q. Now, in preparing this schedule, and more particularly in preparing that portion of the schedule and that column headed "Miles operated in Ohio waters," did you take the miles traveled as an entirety or did you take the miles traveled just from the line to Bromley?

[fol. 265] A. In terms of barrel miles we never consider a back haul. When you start at Gibson Landing and go to Bromley and return, the mileage is indicated as 1192 one way, that is a single trip. Double it for the round trip, but in terms of barrel miles you wouldn't take that, since the barrels hauled are only in one direction.

Q. So we understand each other, am I correct in construing your testimony to be that your mileage operated in

Ohio is only miles at a time when crude oil was being carried?

A. No, you are right, when you say the crude oil was in the barges on the movement up to Bromley, and the boat turned around, and reversed itself, came back empty and traveled 17½ miles coming back.

Q. 17½ miles is not included as a part of the miles operated in the Ohio waters?

A. That is correct.

Q. For the purpose of the preparation of this document, that is Appellant's Exhibit No. 2?

A. That's right.

Q. Now, I believe during the course of your examination you mentioned something about a motor vessel known as the Mount Vernon, is that correct.

A. That is correct.

Q. Now, between what points, during the years in question, that is during the calendar years 1944 and '45, between what points did that vessel operate?

A. She did not operate between any points. She is similar, let's say, to a harbor tug. All she does, you take one of the big tows, the Sohio moves in with six large barges with 110,000 barrels of crude, they can't all be lined up at the dock, for discharging at one time, some of them have to be taken off to the side of the bank and tied up, and it is a job of the little tug, let's say, to move those things back into the position for discharging or move them [fol. 266] out of the way, after they have been discharged, so the next one can get in there, so as to facilitate the operation and speed it up.

Q. Then that boat, to which reference has just been made, namely, the Mount Vernon Motor Vessel, if that is the correct term, is that a boat which stays in the particular locality of Bromley during most of the year?

A. It stays at a terminal all the year, that's right.

Q. Now, during the years 1944 and '45, and I have reference to calendar years, where was that particular vessel stationed during the majority of those two years, if you know?

A. I am in an awkward position, I don't know at the present time I think the Mt. Vernon at the present time

we have that located at Mayersville, Mississippi, twelve months of the year. At that time I believe, I will have to check it, but I think it was located at Mount Vernon, Indiana.

Q. Am I correct in my understanding that some portion of the calendar year that boat was used to assist the larger boats in docking, that is acting as a tow?

A. To assist in moving of let's say barges from the shore to the dock.

Q. During those operations, that boat would be operated in waters that were at least adjacent to the state of Ohio?

A. No, sir, not that, I would have to check that, I honestly can't tell you where she was located in 1944 and '45. To the best of my recollection, it was Mount Vernon, Indiana.

Mr. Tate: I think that's all, Mr. Pattison.

Examined by Mr. Ford.

Q. Did I understand you, that these boats and barges that were engaged in crude oil operation during the years [fol. 267] 1944 and '45 nosed into Cincinnati for repairs or for provisioning only after the cargo had been discharged, and it was on its downward trip?

A. That's right.

Q. Is Bromley up the river, or down the river from Cincinnati?

A. It is four miles down river.

Mr. Ford: That's all.

Re-direct examination.

By Mr. Day.

Q. Mr. Pattison, I have a couple of questions here. You say that during the years 1944 and '45, you think the Mount Vernon was operating at Mount Vernon, Indiana?

A. That's right.

Q. Do you know whether it was for any part of those two years operated at Bromley, Kentucky?

A. I do not, sir, I can find that out readily.

(Discussion off the record.)

Q. On the record, now, one other question, Mr. Pattison, averting to Appellant's Exhibit No. 2, to the second line relating to the route from Gibson Landing, Louisiana, to Bromley, Kentucky, you have stated that the 17½ miles as indicated, being operated in the Ohio River, adjacent to Ohio, includes only one way on that trip, includes only the distance from the Indiana border up to Bromley, and not the distance back, is that correct?

A. That is correct.

Q. Now, I am through with Mr. Pattison, reserving only the right to question him further with respect to the Mount Vernon.

(After Mr. Pattison was excused to obtain certain information he was again recalled to the stand.)

[fol. 268] And also: HENRY WILLIAM PATTISON, recalled, having been previously duly sworn, testified as follows:

Examined by Mr. Day.

Q. Mr. Pattison, have you now ascertained whether the boat named the Mount Vernon was used at any time in Bromley during the years 1944 and '45?

A. No, as earlier testimony indicated, she was used exclusively at Mount Vernon, Indiana, and she was used as we earlier indicated always simply to move and spot empty and loaded barges. For example, a tow might come in with twelve barges, the capacity of the loading dock would only accommodate six barges. The main tow boat would spot the six barges, and then might have to drift on for some little repair or provisioning, or refueling, or something, and the little tow boat, Mount Vernon, would come in and remove those six, after they had been completely unloaded, and spot the remaining six. Used strictly as a harbor boat with one exception, we have a shall river terminal, Henderson, Indiana, I don't believe it is indicated on the map.

Mr. Ford: That is Henderson, Kentucky?

The Witness: It is off to the east there, I might be confused, Henderson is in Kentucky, about twenty-five

miles to the east of Mount Vernon, and there one week I have been told the little tow boat, Mount Vernon, would make a trip with about 4000 barrels of crude in one barge from Henderson to Mount Vernon. With that exception in which she was used as a tow boat for this short movement, she was used only as a terminal boat, solely within the confines of the terminal, and she is currently at Mayersville, moved them down there in July.

[fol. 269] Q. Mayersville, where?

A. Mayersville, Mississippi.

Q. During the years 1944 and '45, it was not used in any waters adjacent to Ohio?

A. Never been used in waters adjacent to Ohio.

Q. How much was the original cost of that boat?

A. I don't have the figures here, and I asked that question and was told it was entered on our books at a gross cost of \$3500, it is a 110 horse power boat, that is probably a little low, which indicates to us that we probably purchased it second-hand.

Mr. Day: That's all.

Cross-examination.

By Mr. Tate:

Q. You have used the term "spot the barges," will you just for my benefit explain what that means?

A. That means spots, these unloading docks are located off the bank of the river. These unloading docks extending out 50, or 75, 100 feet long, and it is necessary to locate these barges adjacent to the docks so that the manifolds and the valves would line up, so the hose connection can be made appropriately, and it is just a question of just that lining up the hose connection, so that you can discharge efficiently.

Mr. Tate: Nothing further.

The Witness: Could I add as to how we handle that same service at Bromley, and there is a multitude of tug service in Cincinnati area and we have been in the habit of hiring that service, it has been hired from the Cincinnati area.

[fol. 270] And also: WILLIAM N. KALL, called as a witness, being first duly sworn, as provided by law, testified as follows:

Examination by Mr. Day:

Q. Will you state your full name?

A. William N. Kall.

Q. Where do you live, Mr. Kall?

A. Cleveland, Ohio.

Q. And by whom are you employed?

A. By the Standard Oil Company.

Q. What is your position with the Standard Oil Company?

A. Chief tax accountant.

Q. How long have you been chief tax accountant?

A. For a little over two years.

Q. And in your position do you have access to and are you familiar with the property records and the books of the Standard Oil Company?

A. I am.

Q. Are you familiar with that for the years 1943 to date?

A. Yes.

Q. Mr. Kall, in our notice of appeal and other documents relating to 1945, it is stated that true value included in the assessment for boats and barges as of January 1st, 1945, is \$1,322,863. Does that include both the crude oil boats and barges that we have been talking about, and the product boats and barges?

A. Yes, it includes all boats and barges.

Q. Can you tell us what part of that figure represents the product boats and barges?

A. Yes, I have available the figures pertaining to the boats and barges of the finished product use.

Q. Would you get those figures?

A. Yes.

Q. Please?

A. Yes.

[fol. 271] Mr. Ford: Now, you are inquiring as with respect of a particular tax year?

Mr. Day: Yes, as of January 1st, 1945.

(Discussion had off the record.)

Q. Mr. Kall, of the \$1,322,863, which is shown as being the true value of the company's boats and barges as of January 1st, 1945, and 70% of which is the assessed value of the company's boats and barges as of January 1st, 1945, can you tell us what part represents the boats and barges in the product service?

A. The part applicable to boats and barges in product service as of January 1st, 1945, \$109,541.64.

Mr. Ford: True value?

The Witness: True value.

Q. And the assessed value would be 70%?

A. Assessed value would be 70%.

Q. And would the balance of \$1,322,863 be the boats and barges in crude oil?

A. The difference between the \$1,322,863 and the \$109,541, would be entirely applicable to the boats and barges in crude oil services.

Q. Now, as of January 1st, 1946, notice of appeal and other documents in the file show the true value of the boats and barges of the company in 1946 assessment as being \$1,303,907, what part of that is the true value of the boats and barges in product service?

A. True value of boats and barges in product service as of January 1st, 1946, would be \$102,022.06.

Mr. Tate: Give me that again.

The Witness: \$102,022.06.

Q. Would the difference between the two figures, would that be the crude oil service as of January 1st, 1946?

A. That is correct.

[fol. 272] Mr. Tate: Do you have that difference there?

The Witness: No, I do not.

Mr. Day: I think that's all. I am through with Mr. Kall.

Mr. Tate: I have one or two questions for clarification of the record.

Cross-examination.

By Mr. Tate:

Q. Mr. Kall, directing your attention to the 1945 tax return, and more particularly to schedule 4, and at the bot-

tom thereof the book value of the boats as returned by Standard Oil Company is shown as \$1,017,518.51, and subsequently the Tax Commissioner made an increase in that valuation, did he not?

A. Yes.

Q. And to what figure was that increased?

A. That was increased to \$1,328,712.

Q. Now, this last figure of \$1,328,712 includes, does it not, the value of a certain monoplane?

Mr. Ford: A certain what?

Mr. Tate: A monoplane, does it not?

The Witness: No, sir.

Q. Now, the figure that you gave me a few minutes ago, I believe was \$1,322,863, now, what I am trying to find out Mr. Kall, is the discrepancy between that figure and the figure as shown on the return as the increase, can you explain that?

A. I may have to retract myself, I answered that too rapid, the \$1,322,000, amended value on the boats and barges may be shown and add, come back to \$1,328,000, to correct my previous answer, I could refer back to my work papers and so satisfy your question.

Q. That's right, now, the figure that you testified to on direct examination as to the true value of the product boats [fol. 273] as of January 1st, 1945, was \$109,541.64, was that correct?

A. That is correct.

Q. Now, is that figure based on the increased figure, that is, does that \$109,000 take into consideration an increase on those particular boats as reflected in the \$1,328,712?

A. The figure of \$109,541 remained the same, the increase which was made by the Commissioner applies to the crude oil boats and barges, and did not apply to the product boats and barges.

Q. Now, just to make sure we understand each other, at the time that you made your return, you listed the three tow boats and 31 tow barges, at \$1,017,518.51, now, in listing that figure, you took into consideration then, did you not, that a portion of that amount represented the value of product boats?

A. That is correct, sir.

Q. And the figure that you took was \$109,514.64?

A. That is correct.

Q. Now, did you assist in the preparation of the appellant's return for 1946?

A. I did, sir.

Q. And do you know whether that return contains a valuation of boats and water craft on Schedule 4?

A. It should, sir.

Q. Perhaps in an effort to assist you, may I call your attention to the 1946 return and ask you to point out to me where the value of those boats is reflected?

A. I don't find the schedule. May I refer to my copy of the work sheet? Schedule 4 of the return, this is the 1946 return?

Q. Let me ask you this question, the appellant's tax return as filed for 1946 shows what valuation on Schedule 4, is that the valuation of boats and water craft?

A. For boats and water craft, shows a depreciated book value of \$726,733.53.

[fols. 274-574] Q. And was that figure subsequently increased by the Tax Commissioner?

A. That was increased by the Tax Commissioner.

Q. Do you know to what amount, that is the amount of the increase?

A. I will have to refer to my papers, I don't recall the figure mentally.

Q. Now, will you tell me the amount that is the figure to which it was increased?

A. The figure of \$726,733.53 was increased to \$1,303,907.

Q. I believe you testified that the true value of the product boats as of 1946 was \$102,022.06?

A. That is correct.

Q. Now, that figure makes up part of the valuation as originally returned, does it not?

A. That is correct.

Mr. Tate: That's all.

Redirect examination

By Mr. Day:

Q. Mr. Kall, was there any increase made by the Department of Taxation in the value of the product boats and barges as shown on the return and as shown on their assessment?

A. There was no changes made to the figures of the product boats and barges as originally returned and subsequently corrected by the Commissioner on the crude oil boats and barges.

Q. Is that true for both 1944 and '45?

A. That is true for both tax returns for 1945 and '46.

Mr. Ford: Read that last question and answer.

(Question and answer read.)

Q. Your statement is true for both the tax years 1945 and '46?

A. That is correct.

(Discussion had off the record.)

[fol. 575] BEFORE THE TAX COMMISSIONER

ENTRY OF THE TAX COMMISSIONER, No. 3327, DATED APRIL 14, 1948

The application for review and redetermination of The Standard Oil Company, Cleveland, Ohio, an inter-county corporation, from an increased personal property tax assessment for the year 1945, after being duly heard, came on to be considered.

The Tax Commissioner being fully advised in the premises, finds that for the year 1945 assessment was made increasing the value of both personal property and intangible property over and above that as listed by the applicant as to items and amounts as follows:

Item	Amount of Increase
1. Average inventory values	\$ 852,013.00
2. Net taxable credits	1,354,230.00

The Tax Commissioner finds that the average inventory values were increased by reason of the fact that applicant

determined the values as listed under the "Lifo" or, last-in, first-out method, and by reason of such fact the values as listed and returned did not reflect true value and finds that the true value of said inventory for such year is as reflected in the increased assessment and said assessment as to the values so determined is hereby affirmed.

The Tax Commissioner further finds that the increase in net taxable credits over and above those as returned by said applicant was due principally to the fact that the applicant deducted taxes and annuities in determining the net taxable credits as so listed and finds that the deduction thereof by the applicant was in error and such assessment as to the increase in net taxable credits is hereby affirmed.

The Tax Commissioner further finds that applicant listed watercraft (boats and barges) at the depreciated book value thereof in the amount of \$1,017,518 but finds that by reason of excessive reserves having been accumulated the true value of said property was in excess of that as returned and finds that the true value of boats and barges taxable in Ohio for 1945 was \$1,322,863.00.

Applicant did not file a claim for deduction with respect to said boats and barges at the time of making return, but [fol. 576] in its application for review protested the assessment of said property on the basis that such property was not taxable in Ohio.

The Tax Commissioner finds that watercraft and aircraft belonging to persons residing in this state and not used in business wholly in another state are taxable in Ohio and orders that the true value of boats and barges in the amount of \$1,322,863.00 be reflected in the final assessment certificate hereinafter ordered.

The Tax Commissioner being further advised in the premises, finds that personal property of the applicant other than boats and barges was listed at less than the true value thereof for the year 1945 in certain taxing districts, partially by reason of excessive reserves having been accumulated and partially by reason of applicant's failure to include in such listing, personal property in the process of construction and finds that the true value of personal property not returned by reason of excessive reserves was \$739,022.00 and \$681,157.00 of such amount was personal property used in manufacturing and that \$57,865.00 was personal property used other than in manufacturing, and

that the true value of personal property in the process of construction and not returned was \$41,716.00 for use in manufacturing and \$38,936.00 for use other than in manufacturing.

The Tax Commissioner further finds that applicant listed personal property in the amount of \$15,052,922.00 which was \$561,037.00 more than the net book value thereof and included in such listing in Cleveland district was machinery used in manufacturing consisting of a catalytic cracking unit.

Applicant in its review and redetermination and evidence submitted in support thereof maintains that in the valuation of its catalytic cracking unit the Tax Commissioner should make an allowance for excessive costs and also an allowance for the general inflated level of the cost index during the war emergency and further contends that by reason thereof the true value of such unit is \$3,000,000.00 as of January 1, 1945. Applicant further contends that its boats and barges are not subject to the personal property taxation under the Ohio laws.

The Tax Commissioner, being further advised in the premises, and consideration having been given to the claims made and evidence submitted by the applicant in support of said application for said year, finds that there is no authority [fol. 577] in law or in long established administrative procedure for recognizing increased costs due to price increases in the determination of true value of personal property used in business; and that the claim of applicant in this regard should be and hereby is denied.

The Tax Commissioner finds that applicant at the time of filing its return did not file a claim in writing as provided in Section 5389, General Code, with respect to its machinery and equipment to the effect that the net depreciated book value was in excess of true value.

The Tax Commissioner further finds that the catalytic cracking unit was assessed in excess of the true value thereof in the amount of \$988,000.00 by reason of allowable excessive costs and equipment not in use but that in view of the judicial determination (*Willys-Overland Motors, Inc. v. Evatt*, 141 O. S. 402) he is without jurisdiction to find a value below net depreciated book value and orders that the value of such property be reduced in the amount of \$561,027.00 being the amount that the machinery and equipment

used in manufacturing in Cuyahoga County exceeded the net depreciated book value thereof, and it is ordered that final assessment certificate issue correcting the assessment in the amount so stated. In all other respects the assessment as to machinery and equipment is hereby affirmed and the Tax Commissioner finds that in the districts in which such incorrect listings were made or corrected herein, the true value of personal property used in manufacturing and used other than in manufacturing for such year, including boats and barges, was as follows:

[fols. 578-643]

Used in Manufacturing

Amended
True Values

Allen County—Shawnee Twp. Sch.	\$ 794,961
Lima	365
Cuyahoga County—Cleveland	10,977,441
Lucas County—Oregon Twp.	3,442,001

15,214,768

Used Other Than in Manufacturing

Cuyahoga County—Cleveland	1,328,712
Portage County—Randolph Twp.	6,306
Suffield Twp.	49,338
Summit County—Franklin Twp. E. Sch.	15,650
Franklin Twp, W. Sch.	44,266
Green Twp.	34,656
Springfield Twp.	15,836
Wayne County—Chippewa Twp.	18,436
Hancock County—Washington Twp.	
Arcadia SD	20,414
Allen County—Lima	42,502
Belmont County—Martins Ferry	19,301
Carroll County—Center Twp. Carrollton SD	211
Cuyahoga County—Cleveland	635,891
Fayette County—Washington C. H.	5,867
Gallia County—Gallipolis	11,701
Hamilton County—Cincinnati	251,219
Mahoning County—Youngstown	47,393
Muskingum County—Zanesville	9,859
Richland County—Mansfield	27,516
Summit County—Akron	124,678
Other Counties—Various	3,243,832

The Tax Commissioner, therefore, orders that final assessment be made for the year 1945 in conformity with and reflecting the findings herein.

Department of Taxation,
C. EMORY GLANDER, *Tax Commissioner*.
(Duly certified.)

[fol. 644] BEFORE THE TAX COMMISSIONER

ENTRY OF THE TAX COMMISSIONER, No. 3276, DATED APRIL
13, 1948

The application for review and redetermination of The Standard Oil Company, Cleveland, Ohio, an inter-county corporation, from an increased personal property tax assessment for the year 1946, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that as to the year 1946 said applicant filed its return and thereafter increased assessment was made for such year and that such assessment reflected increases over and above those as returned by said applicant in the following respects:

Item	Amount of Increase
1. Average inventory values	\$ 935,314.00
2. Net taxable credits	1,567,900.00

The Tax Commissioner finds that the average inventory values were increased by reason of the fact that applicant determined the values as listed under the "Lifo" or, last-in, first-out method, and by reason of such fact the values as listed and returned did not reflect true value and finds that the true value of said inventory for such year is as reflected in the increased assessment and said assessment as to the values so determined is hereby affirmed.

The Tax Commissioner further finds that the increase in net taxable credits over and above those as returned by said applicant was due principally to the fact that the applicant deducted taxes and annuities in determining the

net taxable credits as so listed and finds that the deduction thereof by the applicant was in error and such assessment as to the increase in net taxable credits is hereby affirmed.

The Tax Commissioner further finds that applicant listed machinery and equipment in Cuyahoga County for the year 1946 in the amount of \$4,082,711.00 and that thereafter amended assessment certificate was issued in which the value of the machinery and equipment was increased over and above that as returned in the amount of \$6,916,129.00, such increase being due to the failure of the applicant to list machinery and equipment consisting of a catalytic cracking unit; such unit having been fully reserved on the books of the applicant. Applicant also failed to list personal [fol. 645] property with a true value of \$741,979.00 by reason of excessive reserves having been accumulated and of which \$938.00 was used in manufacturing and \$163,868.00 was used other than in manufacturing and \$577,173.00 was boats and barges. Applicant also failed to list personal property with a true value of \$928,686.00 which was in the process of construction of which \$904,651.00 was to be used in manufacturing and \$24,035.00 was to be used other than in manufacturing.

At the time of filing its return, applicant filed a claim for deduction from book value in words and figures as follows:

	Schedule 2
"Cleveland City, Book Value	\$3,142,425.00
Totals Book Value	3,142,425.00
Deduction Claimed	—
Claimed True Value	6,991,741.00

"The depreciated book value figure of \$3,142,425 given in Item 1 represents the depreciated book value of the Cleveland Refinery machinery and equipment shown on Schedule 2 of the return and includes the Catalytic Cracker (Houdry unit) at Cleveland at a book value of ZERO, for the reason that the book value of this unit through depreciation (including amortization) was reduced to ZERO by January 1, 1946. Should the depreciated book value of this Houdry Unit be properly deemed higher than ZERO within the meaning of G. C. 5389, than the figure of \$3,142,425.00 is to be

treated as increased by such excess over ZERO, and the deduction claimed shall be not ZERO, but the excess of such increased figure over the true value of the refinery personalty of \$6,991,741 above mentioned.

"The supporting data with respect to the above claim are already in the possession of the Department of Taxation.

"Statement Forming Part of the Return

"In connection with the return to which this is attached we wish to call attention to the fact that the return shows a total true value for the Cleveland refinery machinery equipment in Schedule 2 of \$3,991,741. This amount should be increased by \$3,000,000 to reflect and include the true value of the Houdry unit above mentioned bringing the aggregate true value of Schedule 2 to \$6,991,714.00"

Applicant maintains that in the valuation of its catalytic cracking unit the Tax Commissioner should make an allowance [fol. 646] for excessive costs and also an allowance for the general inflated level of the cost index during the war emergency and further contends that by reason thereof the true value of such unit is \$3,000,000.00 as of January 1, 1946. Applicant further contends that its boats and barges are not subject to personal property taxation under the laws of Ohio.

The Tax Commissioner, being further advised in the premises, and consideration having been given to the claims made and evidence submitted by the applicant in support of said application for said year, finds that there is no authority in law or in long established administrative procedure for recognizing increased costs due to price increases in the determination of true value of personal property used in business; and that the claim of applicant in this regard should be and hereby is denied.

The Tax Commissioner further finds that in the amended assessment certificate heretofore issued the catalytic cracking unit was assessed in excess of the true value thereof in the amount of \$932,360.00 by reason of allowable excessive costs and equipment not in use and finds that the true

value of said catalytic cracking unit as of January 1, 1946 was \$5,983,769.00 and further finds that boats and barges were properly assessed as having a taxable situs in Ohio and likewise finds that there was no error in the assessment of the personal property which taxpayer failed to list by reason of excessive reserves having been accumulated and further finds that there was no error in the assessment of personal property in the process of construction and the assessment as heretofore made as to such property is hereby affirmed.

In view of the foregoing, the Tax Commissioner finds that in the districts in which such incorrect listings were made, the true value of personal property used in manufacturing and used other than in manufacturing for such year, including boats and barges, is set forth as to amounts in the districts in the schedule below:

Used in Manufacturing	Amended True Values
-----------------------	------------------------

Allen County—Shawnee Twp.	
Shawnee RSD	\$ 778,163
Cuyahoga County—Cleveland	10,960,267
Lucas County—Oregon Twp.	3,226,760

[fols. 647-649] Used Other Than in Manufacturing	Amended True Values
--	------------------------

Cuyahoga County—Cleveland	1,354,493
Portage County—Randolph Twp.	5,701
—Suffield Twp.	44,883
Summit County—Franklin Twp. E. Sch.	14,301
—Franklin Twp. W. Sch.	43,859
—Green Twp.	31,478
—Springfield Twp.	14,169
Wayne County—Chippewa Twp.	16,618
Hancock County—Washington Twp.	
Arcadia R. S. D.	49,013
Cuyahoga County—Cleveland	670,989
—Brecksville	5,803
—Euclid	11,049
—Chagrin Falls	5,607

Used Other Than in Manufacturing

Amended
True Values

Defiance County—Defiance	3,040
—Hicksville	3,792
Fairfield County—Lancaster	7,711
Franklin County—Columbus	112,936
Fulton County—Wauseon	3,003
—Fayette	2,722
Geauga County—Chardon	3,307
Hamilton County—Cincinnati	239,683
Henry County—Napoleon	3,839
Jefferson County—Steubenville	15,477
Lake County—Painesville	8,118
Lawrence County—Ironton	6,732
Lucas County—Maumee	6,273
—Toledo	161,704
Ross County—Chillicothe	8,715
Scioto County—Portsmouth	64,413
Summit County—Akron	114,858
Williams County—Bryan	4,381
Wood County—Grand Rapids	4,666

The Tax Commissioner further finds that in all other respects the assessment as heretofore made is correct and it is ordered that final assessment certificates issue reflecting the above findings.

Department of Taxation,
C. EMORY GLANDER,
Tax Commissioner.
(Duly Certified.)

(Here follows 1 Photolithograph, side folio 650, and
1 paster, folio 651-737)

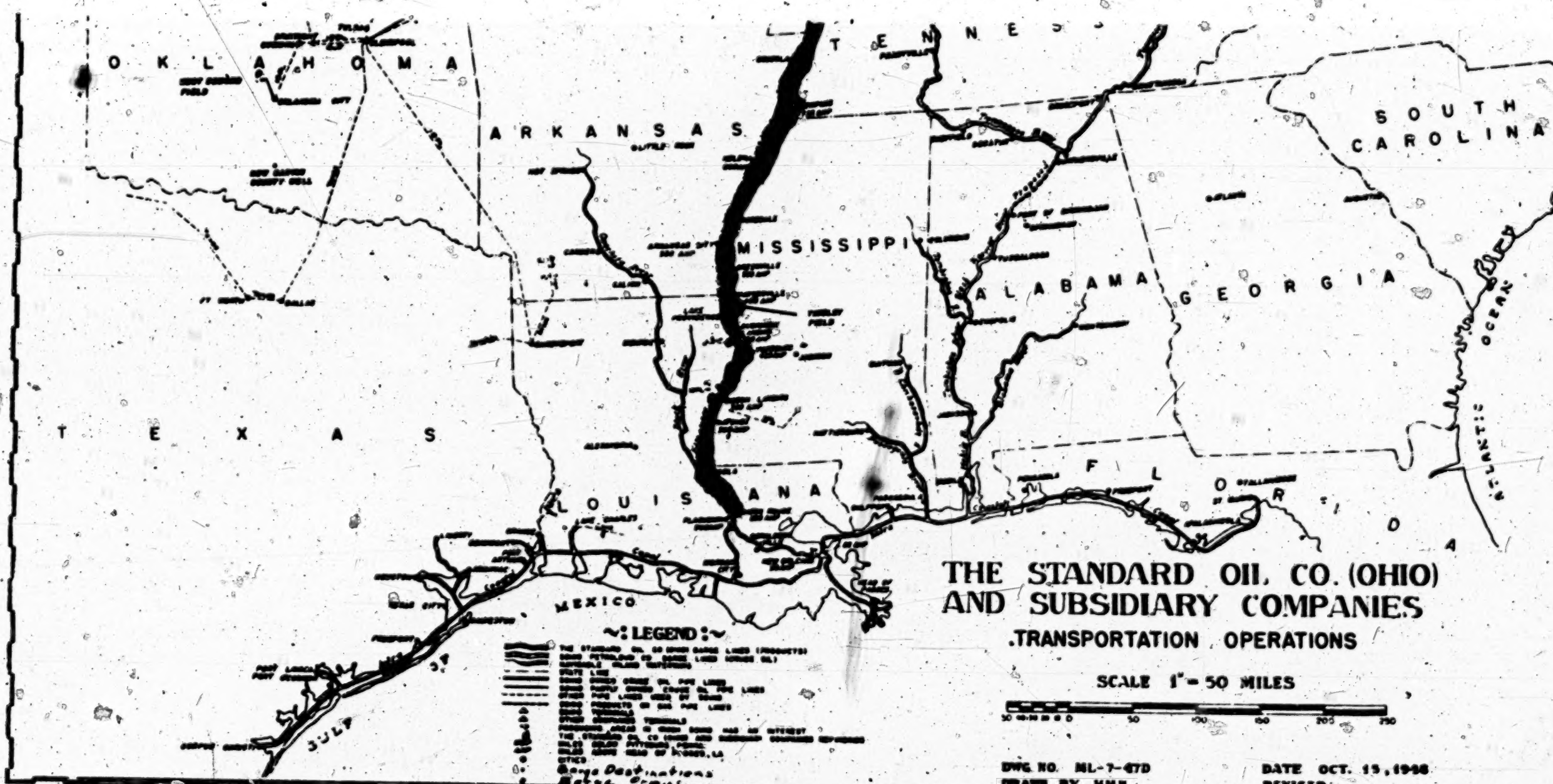
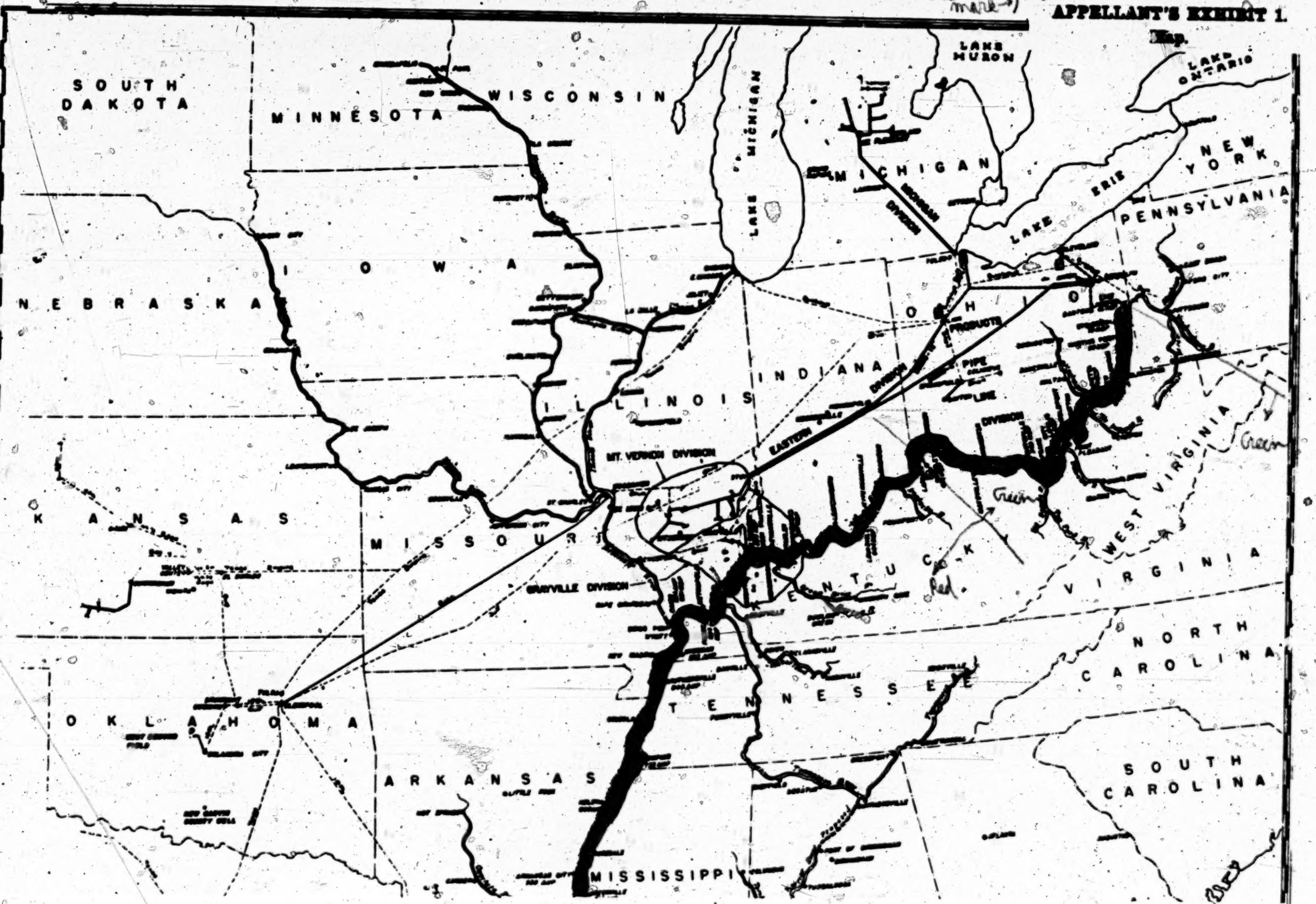
Before the Board of Tax appeals

102A

(Red check mark)

100

APPELLANT'S EXHIBIT 1



THE STANDARD OIL CO. (OHIO)
AND SUBSIDIARY COMPANIES
TRANSPORTATION OPERATIONS

SCALE 1" = 50 MILES

30 40 50 60 70 80 90 100 110 120 130 140 150 160 170 180 190 200 210 220 230 240 250 260 270 280 290 300 310 320 330 340 350 360 370 380 390 400 410 420 430 440 450 460 470 480 490 500 510 520 530 540 550 560 570 580 590 600 610 620 630 640 650 660 670 680 690 700 710 720 730 740 750 760 770 780 790 800 810 820 830 840 850 860 870 880 890 900 910 920 930 940 950 960 970 980 990 1000

DWG NO. NL-7-47D
DRAWN BY HMM

DATE OCT. 15, 1948
REVISED

Red →
Green →

Subsidiary Companies -
Std. Oil Co.

APPELLANT'S E
BEFORE THE BOARD OF
SOHIO PETROLEUM COMPANY—CRUI
OWNED BOATS ONLY

		Steamer Atlas (Ended with October 1944)				Steamer Renown (Ended with October 1944)				M. V. Sohioan (Str. Jo			
From	To	Actual Miles	Miles Op- erated In Ohio Waters	Bbls de- livered	Total BM (00's)	BM In Ohio Waters (00's)	Bbls de- livered	Total BM (00's)	BM In Ohio Waters (00's)	Bbls de- livered	Total BM (00's)	BM In Ohio Waters (00's)	Bbls de- livered
1944													
Cairo, Ill.	Mt. Vernon, Ind.	151	—0—	6,083	9,185	—0—				9,214	13,913	—0—	55,127
Gibson Landing, La.	Bromley, Ky.	1,192	17.5							92,760	1,105,699	16,233	162,044
Memphis, Tenn.	Mt. Vernon, Ind.	382	—0—	443,917	1,695,763	—0—	452,460	1,728,397	—0—	1,140,841	4,358,013	—0—	109,256
	Bromley, Kentucky	738	17.5	323,138	2,384,758	56,549	222,448	1,641,666	38,928	915,150	6,753,807	160,151	108,887
Mt. Vernon, Ind.	"	356	17.5				4,428	15,764	775	6,689	23,813	1,171	
Baton Rouge, La.	"	1,350	17.5										107,463
Memphis, Tenn.	Catlettsburg, Ky.	894	174.3				31,596	282,468	55,072				
TOTAL, 1944				773,138	4,089,706	56,549	710,932	3,668,295	94,775	2,164,654	12,255,245	177,555	542,777
RATIO OF BM IN OHIO WATERS TO TOTAL BM						1.38%			2.58%			1.45%	
1945													
Cairo, Ill.	Mt. Vernon, Ind.	151	—0—							36,619	55,295	—0—	17,619
Mt. Vernon, Ind.	Louisville, Ky.	218	—0—							8,421	18,358	—0—	
Cairo, Ill.	Bromley, Ky.	507	17.5							93,687	474,993	16,395	
Tiptonville, Tenn.	Mt. Vernon, Ind.	238.6	—0—							105,348	251,360	—0—	
Memphis, Tenn.	"	382	—0—							953,207	3,641,251	—0—	497,223
West Wego, La.	Louisville, Ky.	1,237	—0—							92,110	1,139,401	—0—	
Memp. Tenn.	Bromley, Ky.	738	17.5							279,176	2,060,319	48,856	242,887
Gibson Landing, La.	Mt. Vernon, Ind.	748.3	—0—							70,198	525,292	—0—	145,257
Baton Rouge, La.	Bromley, Ky.	1,241.7	17.5							293,939	3,649,841	51,439	
Buckhorn Landing, La.	Mt. Vernon, Ind.	665.4	—0—							101,627	676,226	—0—	39,900
Cairo, Ill.	Paducah, Ky.	47	—0—										7,874
Gibson Landing, La.	Louisville, Ky.	966.3	—0—										
Batof Rouge, La.	Memphis, Tenn.	503.7	—0—										
Gibson Landing, La.	Bromley, Ky.	1,104.3	17.5										
Meraux, La.	Tiptonville, Tenn.	792	—0—										
TOTAL, 1945										2,034,332	12,492,336	116,690	950,760
RATIO OF BM IN OHIO WATERS TO TOTAL BM												0.93%	
TOTAL 1944 & 1945				773,138	4,089,706	56,549	710,932	3,668,295	94,775	4,198,986	24,747,581	294,245	1,493,537
RATIO OF BM IN OHIO WATERS TO TOTAL BM						1.38%			2.58%			1.19%	
1946													
Memphis, Tenn.	Wood River, Ill.	428.5	—0—										97,434
"	Bromley, Ky.	738	17.5							1,189,338	8,777,314	208,134	144,480
"	Mt. Vernon, Ind.	382	—0—							212,829	813,007	—0—	272,874
Mayersville, Miss.	Bromley, Ky.	983	17.5							857,331	8,427,564	150,033	219,250
"	Mt. Vernon, Ind.	627	—0—										56,144
Mt. Vernon, Ind.	Bromley, Ky.	356	17.5										255,984
Cairo, Ill.	Mt. Vernon, Ind.	151	—0—										204,832
Buckhorn Landing, La.	"	665.4	—0—										53,873
Wood River, Ill.	Bromley, Ky.	704.5	17.5										56,148
Gibson Landing, La.	Mt. Vernon, Ind.	748.3	—0—										45,548
Mt. Verhon, Ill.	Catlettsburg, Ky.	512	174.3										
TOTAL, 1946										2,259,498	18,017,885	358,167	1,406,567
RATIO OF BM IN OHIO WATERS TO TOTAL BM												1.99%	
TOTAL 1944, 1945 & 1946				773,138	4,089,706	56,549	710,932	3,668,295	94,775	6,458,484	42,765,466	652,412	2,900,104
RATIO OF BM IN OHIO WATERS TO TOTAL BM						1.38%			2.58%			1.53%	

LANT'S EXHIBIT 2
E BOARD OF TAX APPEALS
PANY—CRUDE OIL RIVER OPERATIONS
OATS ONLY 1944-1945-1946

M. V. Sohio-Memphis (Str. Johnson during June 1944)			Steamer Sohio Fleetwing (S. S. Bou Arada 11-44 to 3-46)			M. V. Sohio Southern (Began July 1946)			Steamer Coral Sea (November 1944 to October 1945)			Total Owned Boats		
Bbls de- livered	Total BM (00's)	BM In Ohio Waters (00's)	Bbls de- livered	Total BM (00's)	BM In Ohio Waters (00's)	Bbls de- livered	Total BM (00's)	BM In Ohio Waters (00's)	Bbls de- livered	Total BM (00's)	BM In Ohio Waters (00's)	Bbls de- livered	Total BM (00's)	BM In Ohio Waters (00's)
55,127	83,242	—0—	17,773	26,837	—0—							88,197	133,177	—0—
162,044	1,931,564	28,358	84,895	1,011,948	14,857				35,411	422,099	6,197	375,110	4,471,310	65,645
109,256	417,358	—0—	106,053	405,122	—0—				101,424	387,440	—0—	2,353,951	8,992,093	—0—
108,887	803,586	19,055										1,569,623	11,583,817	274,683
												11,117	39,577	1,946
107,463	1,450,751	18,806	92,687	1,251,275	16,220				68,258	921,483	11,945	268,408	3,623,509	46,971
												31,596	282,468	55,072
542,777	4,686,501	66,219	301,408	2,693,182	31,077				205,093	1,731,022	18,142	4,698,002	29,125,951	444,317
	1.41%			1.15%						1.05%			1.53%	
17,619	26,605	—0—	60,673	91,616	—0—							114,911	173,516	—0—
			8,650R	43,856R	1,514R							8,421	18,358	—0—
												85,037	431,137	14,881
497,223	1,899,392	—0—	677,091	2,586,488	—0—				216,552	827,229	—0—	105,348	251,360	—0—
												2,344,073	8,954,360	—0—
242,887	1,792,506	42,505	630,900	4,656,042	110,408				96,137	709,491	16,824	92,110	1,139,401	—0—
145,257	1,086,958	—0—							118,499	886,728	—0—	1,249,100	9,218,358	218,593
			374,078	4,644,927	65,464				247,911	3,078,311	43,384	333,954	2,498,978	—0—
39,900	265,495	—0—	97,116	646,210	—0—							915,928	11,373,079	160,287
7,874	3,701	—0—										238,643	1,587,931	—0—
									84,581	817,306	—0—	7,874	3,701	—0—
									97,621	491,717	—0—	84,581	817,306	—0—
									259,585	2,866,597	45,427	97,621	491,717	—0—
									105,348	834,356	—0—	259,585	2,866,597	45,427
												105,348	834,356	—0—
950,760	5,074,657	42,505	1,831,208	12,581,427	174,358				1,226,234	10,511,735	105,635	6,042,534	40,660,155	439,188
	0.84%			1.39%						1.00%			1.08%	
1,493,537	9,761,158	108,724	2,132,616	15,276,609	205,435				1,431,327	12,242,757	123,777	10,740,536	69,786,106	883,505
	1.11%			1.34%						1.01%			1.27%	
97,434	417,505	25,284	966,688	7,134,157	169,170							97,434	417,505	—0—
144,480	1,066,262	—0—	334,235	1,276,778	—0—							2,300,506	16,977,733	402,588
272,874	1,042,379	—0—	557,226	5,477,532	97,515	644,919	6,339,554	112,861				819,938	3,132,164	—0—
219,250	2,155,228	38,369	107,185	672,050	—0—	113,588	712,197	—0—				2,278,726	22,399,878	398,778
56,144	352,023	—0—	6,175	21,983	—0—							276,917	1,736,270	—0—
			16,855	25,451	—0—							6,175	21,983	1,081
255,984	386,536	—0—	98,532	655,632	—0—	45,591	303,363	—0—				272,839	411,987	—0—
204,832	1,362,592	—0—										348,955	2,321,947	—0—
53,873	379,535	9,428										53,873	379,535	9,428
56,148	420,155	—0—				48,659	364,115	—0—				104,807	784,270	—0—
45,548	233,206	79,390										45,548	233,206	79,390
1,406,567	7,815,781	152,471	2,086,896	15,263,583	267,766	852,757	7,719,229	112,861				6,605,718	48,816,478	891,265
	1.95%			1.75%				1.46%					1.83%	
2,900,104	17,576,939	261,195	4,219,512	30,540,192	473,201	852,757	7,719,229	112,861	1,431,327	12,242,757	123,777	17,346,254	118,602,584	1,774,770
	1.49%			1.55%				1.46%		1.01%			1.50%	

[fol. 738]

IN THE SUPREME COURT OF OHIO

THE STANDARD OIL CO., APPELLANT, v. GLANDER, TAX COMM.,
ET AL., APPELLEES

Taxation—Personal property—Boats and barges of Ohio corporation—Operated on Mississippi and Ohio rivers—Sections 5325 and 5328, General Code—Machinery and equipment in process of construction—"Used" in business, when—Section 5325-1, General Code—Valuation—Obsolescence and functional depreciation to be considered—Machinery inefficient and uneconomical due to change in business conditions—Board of Tax Appeals—Decision refusing reduction in valuation unreasonable and unlawful, when—Article XIV, Amendments, U. S. Constitution.

* SYLLABUS

1. The provisions of Section 5328, General Code, that "all ships, vessels and boats, * * * defined in this title as 'personal property,' belonging to persons residing in this state * * * shall be subject to taxation," and the provisions of Section 5325, General Code, defining "personal property" as including "every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district in this state, or not," authorize the taxation, at their true value, of boats and barges owned by an Ohio corporation and operated partly on the Mississippi river and partly on the waters of the Ohio river adjacent to the state of Ohio. The tax levied on such boats and barges, pursuant to such statutory provisions, is not violative of the provisions of the Fourteenth Amendment of the Constitution of the United States.
2. The provisions of Section 5325-1, General Code, that "personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or

instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not," authorize the taxation of personal property "kept and maintained as a part of a 'plant' capable of operation." The word "plant" as used in such section is to be construed and applied as commonly understood in its ordinary acceptation and significance. Machinery and equipment designed for the [fol. 739] production of gasoline, which are in the process of erection and construction as an addition to an operating oil refinery, constitute a part of "a plant capable of operation" and are subject to taxation by virtue of the provisions of Section 5325-1, General Code, as property "used in business."

3. Where property, due to a change in business conditions, has become obsolete, it is unreasonable and unlawful, in determining the valuation of such property for taxation purposes, not to take into consideration that machinery especially designed and constructed during a war period for the manufacture of high octane aviation gasoline, but which machinery is no longer used for such purposes by reason of the fact that the demand for such aviation gasoline has ceased, was subsequently devoted to the manufacture of other motor fuels in which such machinery is inefficient and uneconomical in operation. Such facts are competent and pertinent evidence of obsolescence and functional depreciation and are essential factors in the determination of the value of the property for tax purposes. (*B. F. Keith Columbus Co. v. Board of Revision of Franklin County*, 148 Ohio St., 253, approved and followed.)
4. Where a taxpayer returns its tangible personal property at a valuation in excess of the book value thereof, although filing no claim for reduction from book value under Section 5389, General Code, in connection therewith, pays the tax theretofore determined thereon, and upon audit omitted property claimed by the taxpayer to be not subject to tax is added and assessed by the Tax Commissioner, from which assessment an appeal is taken under Section 5611, General Code, it is unreasonable and unlawful for the Board of Tax Appeals, upon finding that

the taxpayer was entitled to a reduction in valuation in a sum which would not reduce the total value of the property assessed below the book value thereof, as shown by the taxpayer in his return, to refuse such reduction on the grounds that such tax has been paid and the time for issuance of the final amendment certificate by the Tax Commissioner has expired during such appeal. (*Wright Aeronautical Corp. v. Glander, Tax Commr.*, 151 Ohio St., 29, distinguished.)

(No. 32060—Decided March 14, 1951.)

Appeal from the Board of Tax Appeals.

STATEMENT OF THE CASE

The appellant is The Standard Oil Company, an Ohio corporation, and the appellees are C. Emory Glander, Tax [fol. 740] Commissioner of Ohio, and John A. Zangerle, auditor of Cuyahoga county.

This appeal from the Board of Tax Appeals involves the final orders and tax assessments made by the Tax Commissioner with respect to and on certain tangible personal property of the appellant for the tax years 1943, 1944, 1945 and 1946, respectively. Three separate appeals to the Board of Tax Appeals were prosecuted by the appellant which were consolidated in the hearing by that board. One of the appeals, involving the validity of a final assessment by the Tax Commissioner for the year 1945, was decided in favor of the appellant and no appeal was prosecuted to this court. The appeal to this court is limited to the decision of the Board of Tax Appeals in regard to Tax Commissioner's case No. 12488, which involves a final assessment certificate and an amendment thereof assessing taxes for the tax years 1943 and 1944 on a Houdry catalytic cracking unit which was in the process of construction on January 1, 1943, and on January 1, 1944, but which was not completed and not in operation on either of those tax-listing dates, and Tax Commissioner's case No. 14381, which is an appeal from final orders of the Tax Commissioner assessing taxes for the tax years 1945 and 1946, respectively, on certain towboats and barges of the appellant, the then finished and operating Houdry catalytic cracking unit above referred.

to and certain machinery and equipment in process of construction which were unfinished and not in operation on January 1, 1945, and January 1, 1946.

The decision of the Board of Tax Appeals affirmed in most respects the orders and assessments in each of these causes, and the appellant, by appeal to this court, presents the question whether the decision of the Board of Tax Appeals is unreasonable or unlawful.

[fol. 741] IN THE SUPREME COURT OF OHIO

OPINION, PER MATTHIAS, J.

Messrs. McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett and Mr. Rufus S. Day, Jr., for appellant.

Mr. Herbert S. Duffy, attorney general, and Mr. Donald B. Leach, for appellee Tax Commissioner.

MATTHIAS, J.:

The appellant has assigned numerous errors with respect to each of the two appeals considered by the Board of Tax Appeals and which the board determined adversely to appellant. These assignments have been summarized in the brief of the appellant and will be discussed in the order therein stated.

The first questions of law presented are: Did the state of Ohio have jurisdiction, under Section 5325, General Code, to assess taxes for the years 1945 and 1946 upon certain boats and barges of the company which were not in use in Ohio and the use of which in waters bordering on Ohio was insubstantial, and is such assessment violative of the Fourteenth Amendment of the Constitution of the United States?

The record discloses that in its 1945 personal property tax return the appellant listed three towboats and 31 barges at a depreciated book value of \$1,017,518, and in 1946 listed boats and barges having a depreciated book value of \$726,733. The Tax Commissioner on audit raised the valuation of the boats and barges for 1945 to a true value of \$1,322,863 and raised the valuation for 1946 to a true value of \$1,

303,907. Thereafter, within time, the appellant filed its application for review and redetermination for 1945 and 1946, contending, first, that its crude oil boats and barges, which carried crude oil from various points on the Mississippi river, up the Mississippi and Ohio rivers, to points in Indiana and Kentucky, were not taxable in Ohio under Section 5325, General Code, for the reason that they were not used in Ohio and their use in waters bordering on Ohio was [fol. 742] insubstantial and, therefore, taxation of these boats and barges by the state was violative of the due process clause of the Fourteenth Amendment of the United States Constitution.

The crude oil boats and barges involved constituted the greater part of the valuation upon which the taxes assessed were based. The remainder of the assessed value represented gasoline boats and barges engaged in transporting gasoline to various points in Ohio. These latter boats and barges are not involved in the controversy.

The contentions of the appellant were rejected in their entirety by the Tax Commissioner on review and redetermination. Upon appeal the Board of Tax Appeals held that, under Section 5325, General Code, with the exception of one small boat valued at \$3,500, the oil boats and barges of the appellant were taxable in Ohio. The board announced that, being an administrative tribunal, it had no jurisdiction to decide the constitutional question presented.

The facts upon which the appellant bases its claim of want of jurisdiction of the state to levy such tax are as follows:

These crude oil boats and barges, during 1944 and 1945, were engaged in transporting oil from various points on the lower Mississippi river to Mount Vernon, Indiana, and Bromley, Kentucky. The crude oil unloaded at Mount Vernon, Indiana, was moved from that point by pipe line to various destinations, and the oil unloaded at Bromley, Kentucky, was likewise moved to the appellant's refinery at Latonia, Kentucky.

The appellant introduced evidence to show the number of miles traversed and the number of barrels of oil carried by each boat on each routing during the years 1944 and 1945. This evidence showed that the greater bulk of the operation

of these boats during each year was over three routes— [fol. 743] Memphis, Tennessee, to Mount Vernon, Indiana, Memphis, Tennessee, to Bromley, Kentucky, and Baton Rouge or Gibson, Louisiana, to Bromley, Kentucky; and that of the total river-route mileage traversed by the appellant's crude oil boats and barges from the lower Mississippi river to Bromley, Kentucky, only 17½ miles was through waters bordering on the state of Ohio.

In an attempt to arrive at a percentage figure the appellant computed these activities on a basis of "barrel miles" (number of miles multiplied by number of barrels carried) and found that the percentage of barrel miles on the portion of the river bordering on Ohio was, in 1944 and 1945, 1.27 per cent of the total barrel miles. It is claimed that none of the barrel miles was actually within the state of Ohio since its border is low water mark on the Ohio side of the river and the boats and barges were operated south of the border.

These crude oil boats and barges were registered from Cincinnati but, except for short stops for food, fuel or minor repairs, never were docked at Cincinnati, all repairs being made at Paducah, Kentucky, St. Louis, Missouri, or some other down-river point. No cargoes were ever taken on at Cincinnati during the years 1944 and 1945.

The appellant contends that, even if the company's crude oil boats and barges were constitutionally within Ohio's jurisdiction, Section 5325, General Code, should not be so construed as to authorize taxation thereof.

Section 5328, General Code, provides in part as follows:

"All ships, vessels and boats, and shares and interests therein, defined in this title as 'personal property,' belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in [fol. 744] business wholly in another state, shall be subject to taxation."

Section 5325, General Code, defines "personal property" as follows:

"* * * every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is

within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district within this state, or not."

The appellant contends that its boats would be taxable in Ohio only if they were "used or designed to be used exclusively or partially in navigating any waters within or bordering on this state"; that, since the boats and barges were being used exactly as "designed," the only question under the statute is whether the actual use made of the boats and barges during the years in question brought them within the provisions of the statute.

The company contends that although this statute purports to tax boats operating in waters bordering on Ohio, it should not be construed to apply to boats whose use in waters within or bordering on Ohio was insubstantial. This contention is based upon the maxim, *de minimis non curat lex*. The decision of the Supreme Court of the United States in the case of *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S., 680, 90 L. Ed., 1515, 66 S. Ct., 1187, is cited in support of that contention. That case involved portal to portal pay.

Both the Tax Commissioner and the Board of Tax Appeals refused to adopt that interpretation of Section 5325, General Code. We quote from the decision of the Board of Tax Appeals:

"Section 5366, General Code, characterizes as 'taxable [fol. 745] property' all the kinds of property mentioned or referred to in the above quoted provisions of Section 5328, General Code. Section 5371, General Code, provides generally that personal property used in business shall be listed and assessed in the taxing district in which such business is carried on. This section, however, further provides as follows:

"Ships, vessels, boats and aircraft, and shares and interests therein, shall be listed and assessed in the taxing district in which the owner resides.' Inasmuch as it appears that at all of the times here in question these boats and barges were used in part in navigating the waters of the Ohio river bordering on this state, such boats and barges as the property of the appellant, an Ohio corporation having

its domicile in this state, were clearly taxable under the expressed terms of the above noted statutory provisions."

We are in accord with that statement for it clearly appears that under the facts disclosed by the record such crude oil boats and barges were not used exclusively in another state and, therefore, came within the provisions of Section 5328, General Code.

Since these crude oil boats and barges came within the provisions of Sections 5325 and 5328, General Code, the contention of the appellant that the boats and barges were not within the jurisdiction of the state of Ohio for tax purposes becomes pertinent. The appellant contends that tangible personal property is not constitutionally subject to multiple taxation and, therefore, is taxable only by the state in which it has its situs. Further, appellant contends that under the decision of the Supreme Court of the United States in the recent case of *Ott, Commr., v. Mississippi Valley Barge Line Co.*, 336 U. S., 169, 93 L. Ed., 585, 69 S. Ct., 432, river boats are subject to taxation only in accordance with the rule of proportionate taxation heretofore applied in the taxation of the rolling stock of railroads. [fol. 746] This contention requires an examination of that case for if it is applicable to the boats and barges owned by the appellant, there is now no provision in the laws of Ohio under which they may be taxed.

The facts in the *Ott case*, *supra*, are set forth in the opinion, as follows:

"Appellees are foreign corporations which transport freight in interstate commerce up and down the Mississippi and Ohio rivers under certificates of public convenience and necessity issued by the Interstate Commerce Commission. Each has an office or agent in Louisiana but its principal place of business is elsewhere. The barges and towboats, which they use in this commerce are enrolled at ports outside Louisiana; but they are not taxed by the states of incorporation.

"In the trips to Louisiana a tugboat brings a line of barges to New Orleans where the barges are left for unloading and reloading. Then the tugboat picks up loaded barges for return trips to ports outside that state. There is no

fixed schedule for movement of the barges. But the turn-arounds are accomplished as quickly as possible with the result that the vessels are within Louisiana for such comparatively short periods of time as are required to discharge and take on cargo and to make necessary and temporary repairs.

"Louisiana and the city of New Orleans levied ad valorem taxes under assessments based on the ratio between the total number of miles of appellees' lines in Louisiana and the total number of miles of the entire line. The taxes were paid under protest and various suits, which have been consolidated, were instituted in the District Court by reason of diversity of citizenship for their return, the contention being that the taxes violated the due process clause of the Fourteenth Amendment and the commerce clause."

"Following the citation and analysis of the cases wherein [fol. 747] the court had evolved the rule that vessels are taxable solely at the domicile of the owners, save where they had acquired an actual situs elsewhere, the Supreme Court of the United States concluded as follows:

"We see no practical difference so far as either the due process clause or the commerce clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. The problem under the commerce clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' *Nashville, C. & St. L. Ry. v. Browning*, 310 U. S., 362, 365 [84 L. Ed., 1254, 1255, 60 S. Ct. 968]. So far as the process is concerned the only question is whether the tax in actual operation has relation to opportunities, benefits, or protections conferred or afforded by the taxing state. See *Wisconsin v. J. C. Penny Co.*, 311 U. S., 435, 444 [85 L. Ed., 267, 270, 61 S. Ct., 246, 130 A. L. R., 1229]. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state.

"There is such an apportionment under the formula of the *Pullman* case. Moreover, that tax, like taxes on property, taxes on activities confined solely to the taxing state, or taxes on gross receipts apportioned to the business carried on there, has no cumulative effect caused by the interstate character of the business. Hence there is no risk of

multiple taxation. Finally, there is no claim in this case that Louisiana's tax discriminates against interstate commerce. It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each state may impose on the activities or property within its borders. See *Western Live Stock v. Bureau of Revenue*, 303 U. S., 250, 254, 255 [, 82 L. Ed., 823, 826, [fol. 748] 827, 58 S. Ct., 546, 115 A. L. R., 944] and cases cited. We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises."

As hereinbefore stated, the question before the Supreme Court of the United States in the *Ott* case was whether the state of Louisiana and the city of New Orleans could levy ad valorem taxes based upon a mileage percentage figure. The appellant in the instant case contends that that decision has the effect of substituting a new formula for the long established rule of taxation whereby states, wherein the owners of watercraft are domiciled, can tax such boats to their full value as other personal property so owned is taxed. It is to be noted, however, that this conclusion must be reached by inference from the language used in the *Ott* case. It is not within the scope of the facts there presented or the decision rendered thereon.

Other recent decisions of the Supreme Court of the United States are more directly in point; cases in which that court recognized the right of the domiciliary state to levy the full ad valorem tax on personal property passing through other states in interstate commerce.

In the case of *Northwest Airlines, Inc. v. Minnesota*, 322 U. S., 292, 88 L. Ed., 1283, 64 S. Ct., 950, the question presented was stated by Mr. Justice Frankfurter as follows:

"The question before us is whether the commerce clause or the due process clause of the Fourteenth Amendment bars the state of Minnesota from enforcing the personal property tax it has laid on the entire fleet of airplanes owned by the petitioner and operated by it in interstate transportation. The answer involves the application of settled legal principles to the precise circumstances of this case. To these, about which there is no dispute, we turn."

[fol. 749] - The pertinent facts therein were as follows:

"Northwest Airlines is a Minnesota corporation and its principal place of business is St. Paul. It is a commercial airline carrying persons, property and mail on regular fixed routes, with due allowance for weather, predominantly within the territory comprising Illinois, Minnesota, North Dakota, Montana, Oregon, Wisconsin and Washington. For all the planes St. Paul is the home port registered with the Civil Aeronautics Authority, under whose certificate of convenience and necessity Northwest operates. At six of its scheduled cities, Northwest operates maintenance bases, but the work of rebuilding and overhauling the planes is done in St. Paul. Details as to stopovers, other runs, the location of flying crew bases and of the usual facilities for aircraft, have no bearing on our problem.

"The tax in controversy is for the year 1939. All of Northwest's planes were in Minnesota from time to time during that year. All were, however, continuously engaged in flying from state to state, except when laid up for repairs and overhauling for unidentified periods. On May 1, 1939, the time fixed by Minnesota for assessing personal property subject to its tax (Minn. Stat. 1941, Section 273.01), Northwest's scheduled route mileage in Minnesota was 14% of its total scheduled route mileage, and the scheduled plane mileage was 16% of that scheduled. It based its personal property tax return for 1939 on the number of planes in Minnesota on May 1, 1939. Thereupon the appropriate taxing authority of Minnesota assessed a tax against Northwest on the basis of the entire fleet coming into Minnesota. For that additional assessment this suit was brought. The Supreme Court of Minnesota, with three judges dissenting, affirmed the judgment of a lower court in favor of the state. [*State v. Northwest Airlines, Inc.*,] 213 Minn., 395, 7 N. W. [fol. 750] (2d), 691. A new phase of an old problem led us to bring the case here. [*Northwest Airlines, Inc. v. Minnesota*,] 319 U. S. 734 [, 87 L. Ed. 1695, 63 S. Ct. 1031]."

In holding that the state of Minnesota was authorized to levy a tax upon "all personal property of persons residing therein, including the properties of corporations," the court reviewed its decisions in previous cases and held that the

doctrine of tax apportionment for instrumentalities engaged in interstate commerce introduced in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876, was inapplicable. Relying on the case of *People, ex rel. New York Central & Hudson River Rd. Co. v. Miller*, 202 U. S. 584, 50 L. Ed. 1155, 26 S. Ct. 714, the court stated:

"Here, as in that case, a corporation is taxed for all its property within the state during the tax year none of which was 'continuously without the state during the whole tax year.' * * * The fact that Northwest paid personal property taxes for the year 1939 upon 'some proportion of its full value' as its airplane fleet in some other state does not abridge the power of taxation of Minnesota as the home state of the fleet in the circumstances of the present case."

It is to be noted that the *Northwest Airlines case* was mentioned in the opinion in the *Ott case*, but it was neither modified nor limited in any way. In its essential facts the *Northwest Airlines case* is similar to the instant case. It involved a tax by the domiciliary state whereas the *Ott case* involved the validity of a tax by a state other than the domiciliary state. We do not believe the *Northwest Airlines case* and the *Ott case* are in conflict. The Supreme Court of the United States applied the rule to the taxation of tangible personal property which it had theretofore applied to the taxation of intangible personal property, that [fol. 751] is; that such property may be taxed both at its domiciliary situs and at the place where it had acquired a business situs.

It is pertinent to note that in the instant case we are not considering the taxation of the property of a public utility engaged in interstate transportation but rather the taxability of property of a domestic corporation which operated both within and beyond the limits of this state. Further, since the company here is not a public utility, there is no provision under the statutes of this state for the establishment of any mileage, barrel mileage, time period or other arbitrary classification, and this court is entirely without authority to select any apportionment method and adopt it as the correct applicable principle. That is purely a legislative function and, as hereinbefore stated, if the tax

levied is unconstitutional it follows that there is no liability therefor whatever. The record does not disclose that any other state taxed these boats and barges, although there is an inference that Kentucky is now asserting its right to do so. We conclude that the levying of the tax in question was not violative of the Fourteenth Amendment of the Constitution.

We come now to the question of machinery and equipment in process of construction.

The company included no machinery in process of construction in its personal property tax returns for the years 1943, 1944, 1945 and 1946, claiming such property was not taxable. The Tax Commissioner, on audit for those years, found such machinery to be taxable and added to the assessment certificate for 1943 and 1944 the value, at book cost, of the unfinished Houdry catalytic cracking plant, assessed the machinery in each of those years at 50 per cent of cost and allowed a further reduction in book cost of 12 per cent, because he found that book cost exceeded the "true value" by such percentage.

[fol. 752]. The unfinished Houdry plant was the only machinery in process of construction involved in the 1943 and 1944 assessment, and the plant was completed by January 1, 1945. However, in the tax years 1945 and 1946, the company had other machinery, the bulk of which constituted an unfinished thermal gas plant located at Cleveland. The Tax Commissioner added these to the tax assessment certificate for the years 1945 and 1946, valuing them at 50 per cent of the book value.

The company contends that such machinery was not taxable in any of those years and that the Houdry plant should have been given a reduced valuation by reason of the excessive cost of construction on account of war emergency conditions existing at the time of the erection of that plant and of obsolescence.

• The Tax Commissioner held that the machinery in process of construction was "used in business" within the definition of that term in Section 5325-1, General Code. The pertinent part of that section reads as follows:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered

to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise

The Board of Tax Appeals held that the clause, "when kept and maintained as a part of a plant capable of operation, whether actually in operation or not," covers machinery in process of construction.

The company and the Tax Commissioner are in disagreement as to the meaning of the words, "kept," "maintained" and "part of a plant capable of operation," dis-[fol. 753] closing that the limited language used in this section in defining "used in business" requires our consideration.

It is the contention of the company that the words, "kept and maintained," as applied to the machinery herein, contemplate machinery completed and operative, since machinery is not maintained until it first has been completely constructed. The Tax Commissioner ascribes to the words a broader meaning which includes retaining possession of the machinery, and asserts that its retention and prevention of corrosion and other deterioration constitute "maintaining" within the definition of the term.

Much more divergence of view occurs when the parties hereto define the word, "plant." The company defines the word, "plant," as including only the Houdry catalytic cracking plant and the Thermal cracking plant and claims that, since each of these, of itself, was machinery in process of construction for the tax years in question, it necessarily could not be "part of a plant capable of operation," for it was not completed.

In the view of the Tax Commissioner the "plant" consisted of the entire operating refinery and included its many operating units among which were the Houdry catalytic cracking plant and the Thermal cracking plant, and consequently these units, even while under construction, were parts of a "plant capable of operation."

The Board of Tax Appeals, in construing Section 5625-1, General Code, *supra* made the following observation:

"It is to be observed however that the above noted provisions of Section 5325-1, General Code, were not enacted with special reference to either appellant's refineries at Cleveland or elsewhere or to petroleum refineries generally [fol. 754] in this state. And in this view recognition must be given to the general definition that in an industrial or commercial sense, a 'plant' includes real estate and all else that represents capital invested in the means of carrying on a business, exclusive of raw material or the manufactured product. This leads to the conclusion that as to the refinery property of the appellant each refinery as a whole at its location in Cleveland or elsewhere is 'a plant' within the meaning of Section 5625-1, General Code. Inasmuch as each unfinished item or [sic] machinery and equipment here in question was a part of a refinery or 'plant' capable of operation and in actual operation and was kept and maintained as such, it was property 'used' and 'used in business' within the meaning of the taxing statutes here under consideration."

In our view such application of Section 5625-1, General Code, is in accord with the well established rule that words of a statute, in common use or other than terms of art or science, will be construed in their ordinary acceptation and significance and with the meaning commonly attributed to them. *Mutual Bldg. & Investment Co. v. Efros*, 152 Ohio St., 369, 89 N. E. (2d), 648.

The following statement from 37 Ohio Jurisprudence, 546, Section 290, is pertinent:

"Courts should be slow to impart any other than their natural and commonly understood meaning to terms employed in the framing of a statute. Too narrow a construction of terms is not favored. Statutory phraseology should not be given an unnatural, unusual, strained, arbitrary, forced, artificial, or remote meaning which may, in its last analysis, be technically correct but wholly at variance with the common understanding of men. A technical construction of words in common use is to be avoided."

We hold that the decision of the Board of Tax Appeals that the Houdry catalytic cracking plant and the Thermal [fol. 755] cracking plant, although under construction, constituted machinery "kept and maintained as a part of a plant capable of operation" was not unreasonable or unlawful.

Having determined that the Houdry plant, with other machinery, was subject to taxation while in the process of construction, the question directly presented is whether the valuation thereof by the commissioner, as corrected, and modified by the Board of Tax Appeals, constituted the true value thereof.

The principal contention of the company as to assessed value relates to the Houdry catalytic cracking plant. That plant was a war project and was constructed to produce aviation gasoline much needed during the war, and because of the urgent need for and shortage of such fuel the company necessarily expended large sums of money in overtime wages and for required materials with a result that the plant cost \$2,419,102.76 more to construct than the estimate furnished by the construction company. Both the company and the Tax Commissioner agree that the part of such "overrun," or excessive cost of construction, which did not add value to the property, should be eliminated from the assessed value thereof. The difference between the parties in that regard is primarily one of fact—the company urging that the amount of "overrun" should be \$1,423,852, whereas the Tax Commissioner held it to be \$977,777.

On appeal, the Board of Tax Appeals fixed the amount of such excess costs at \$1,200,000. The company contends that, on a percentage basis, the book value should be reduced by 15.64 per cent. The Board of Tax Appeals made this percentage 13.18 per cent of cost. These figures, of course, involve the value of the plant as completed but are likewise applicable to the plant when under construction in 1943 and 1944. These percentages were used by the Board of Tax [fol. 756] Appeals, together with a depreciation allowance for the years it was used after completion, resulting in a valuation for tax year 1943 at \$377,580, 1944, \$5,399,459, 1945, \$6,593,502 and 1946, \$5,899,439.

The company contends that the figure arrived at by the Board of Tax Appeals not only failed to give sufficient

allowance for the excess cost of construction or "overruns" but also made inadequate allowance for obsolescence of the Houdry catalytic cracking plant which it contends became partially obsolete at the termination of the war because the process of catalytic cracking had been replaced by more efficient methods.

The Houdry plant consisted of several units, which were a six-case unit, a three-case unit and foundations for another three-case unit which has never been constructed. The record discloses that the three-case unit was originally built as a special attachment to the six-case basic Houdry unit to assist the six-case unit in producing as large a quantity of high octane gasoline as possible during the war. Its function was to treat oil, which had been partly processed in the six-case unit, in such manner as to step up its octane rating for aviation purposes. That use terminated with the war, and the only use of the three-case unit during the year 1946 was in the manufacture of motor gasoline.

The record discloses that the three-case unit was inefficient in operation, not yielding as large a percentage of motor fuel from the oil processed as the larger regularly designed unit, resulting in a higher cost of operation.

The company claims that in the year 1946 it was entitled to a deduction from the value of this Houdry plant in the sum of \$1,292,077 for obsolescence of the three-case unit and for the foundation of the three additional cases which were never built. The Board of Tax Appeals did regard the base for the additional cases as to some extent idle [fol. 757] equipment and consequently reduced the value thereof from \$135,000 to \$13,500, but refused to allow any reduction by reason of the claimed obsolescence of the three-case unit. The board considered it as a part of the Houdry catalytic cracking plant as a whole and as an operating unit thereof and applied to it the same rate of reduction for depreciation and overrun as were determined applicable to the remainder of the plant.

Evidence in the record supports the determination of the Board of Tax Appeals that the "overruns" totaled \$1,200,000, and its decision in that respect was not unreasonable or unlawful. However, the refusal of the Board of Tax Appeals to make some allowance for obsolescence of the three-case unit was unreasonable and unlawful in that the Board

of Tax Appeals failed to apply the principles established by this court in the case of *B. F. Keith Columbus Co. v. Board of Revision of Franklin County*, 148 Ohio St., 253, 74 N. E. (2d), 359. The syllabus of that case provides as follows:

"1. In determining the value of property for the purpose of taxation, the assessing body must take into consideration all factors which affect the value of the property."

"2. Functional depreciation occurs where property, although still in good physical condition, has become obsolete or useless due to changing business conditions and thus for all practical considerations is of little or no value to the owner of such property."

"3. Where the evidence shows that, due to a change of business conditions, property has become obsolete, it is unreasonable for the assessing body not to consider this factor of functional depreciation in arriving at the tax value."

The facts in regard to the limited use of this three-case [fol. 758] unit were not in dispute and require some allowance for the disclosed obsolescence. The failure of the Board of Tax Appeals to make such determination renders their decision as to the value of the Houdry plant for the year 1946 unreasonable and unlawful and requires a reversal of the order in that regard and a remand to the board for the redetermination of the correct true value of such plant for the year 1946.

At the conclusion of the proceeding before the Board of Tax Appeals, an application for rehearing was filed by the company wherein it protested the failure of the board to reduce the value of the machinery and equipment in the full amount of the excess valuation theretofore determined by it.

For the year 1945 the company failed to file a claim for deduction from book value (form 902) for the taxable property of the company, as disclosed by its inter-county return, so that, when the machinery in process of construction (the thermal plant) was added to the return, the sum of all the property listed exceeded the book values originally returned in the inter-county tax return by the sum of \$561,027.

When the Tax Commissioner determined that the excess cost of construction or "overrun" on the Houdry plant was

\$988,000, he allowed only the sum which the true valuations as determined exceeded the listed book values, or a reduction in the sum of \$561,027. The company contends that since all such property was in Cuyahoga county wherein the true value of the property found exceeded the book value by the sum of \$900,002, the latter sum should have been allowed.

However, the company having concededly paid taxes on a basis in excess of the book values of personal property in Cuyahoga county as stated in its inter-county tax return, the Board of Tax Appeals held that as to the year 1945 any question of reducing the assessed tax values below those on [fol. 759] which the company had paid the tax was moot and should not be considered, and allowed no reduction.

The company contends that the payment of the tax on the higher basis shown by the return did not render the question involved moot, but on the contrary the reduction should have been allowed because the classified tax law permits the refund to a taxpayer of a tax he has already paid but which, on appeal, is held not to have been owed. That contention is based on the provisions of Section 5395, General Code, which provides in part as follows:

“Excepting as to any taxable property concerning the assessment of which an *appeal has been filed* under Section 5611 of the General Code, the Tax Commissioner may finally assess the taxable property required to be returned by any taxpayer . . . for any prior year or years within the time limited therefor in Section 5377 of the General Code . . .” (Emphasis supplied.)

The Board of Tax Appeals in its decision admits, in effect, that the taxpayer was entitled to a reduction in valuation in the sum of \$900,002, but states, in effect, that, because the appeal was determined after the time for issuance of the final assessment certificate by the Tax Commissioner had expired and the tax had been paid, such reduction would be ineffective. The payment of the tax when due to avoid interest and penalties and when accompanied by a proper appeal protects all the taxpayer's rights until all administrative and judicial review thereof is completed.

Where a taxpayer is required by law to file an inter-county return he is not thereby precluded from claiming

the rights of a taxpayer filing a return in a single county. (*Wright Aeronautical Corp. v. Glaxder, Tax Commr.*, 151 Ohio St., 29, 84 N. E. [2d], 483, distinguished.)

[fol. 760] CONCURRING OPINION, PER TAFT, J.

The decision of the Board of Tax Appeals is not unreasonable or unlawful except as to its refusal to make proper allowance for obsolescence in the year 1946 and its refusal to grant the taxpayer proper reduction to book values for the year 1945 as above indicated.

The cause is accordingly remanded to the Board of Tax Appeals for further proceeding in accordance with this opinion.

Decision affirmed in part and reversed in part

Weygandt, C. J., Zimmerman and Hart, JJ., concur.

Stewart and Taft, JJ., concur, except in paragraph two of the syllabus and the portion of the opinion relating thereto.

Middleton, J., not participating.

TAFT, J., concurring:

I have considerable doubt about paragraph two of the syllabus. However, I reach the same result on another ground. The Houdry plant, even before it was "capable of operation," was at that time "acquired or held as means or instruments for carrying on the business" within the meaning of the words found in Section 5325, General Code. At that time, the Houdry plant might not be so "held" but it was so "acquired." The words "acquired or held" are in the disjunctive.

Stewart, J., concurs in the foregoing concurring opinion.

[fol. 761]

[File endorsement omitted]

IN THE SUPREME COURT OF OHIO

No. 32,060

[Title omitted]

CERTIFICATE AS TO THE COURT'S INTENT TO HOLD SECTIONS 5323 AND 5325 GENERAL CODE OF OHIO TO BE VALID AND NOT REPUGNANT TO THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES—Filed May 22, 1951.

The Supreme Court of Ohio hereby certifies that, when it held, in the first syllabus of its decision in the above case, that Sections 5328 and 5325 of the General Code:

“... authorized the taxation, at their true value, of boats and barges owned by an Ohio corporation and operated partly on the Mississippi River and partly on the waters of the Ohio River adjacent to the State of Ohio,”

and that:

[fols. 762-765] “The tax levied on such boats and barges, pursuant to such statutory provisions, is not violative of the provisions of the Fourteenth Amendment of the Constitution of the United States”,

it intended thereby, as evidenced by this court's opinion in the case, to hold that the said statutes required boats and barges so owned and operated to be taxed at their true value, and that as so construed said statutes were valid and in no respect violative of or repugnant to the Fourteenth Amendment of the Constitution of the United States.

The court further certifies that the appellant in its briefs and in its oral argument before this court contended that said statutes, as so construed, were invalid on the ground that they were repugnant to the Fourteenth Amendment of the Constitution of the United States and that appellee in its brief and oral arguments contended the contrary. This court further certifies that it rejected appellant's contention and sustained the validity of said statutes under the United States Constitution..

The court further certifies that its decision with respect to the taxability of appellant's boats and barges for the years 1945 and 1946 is a final judgment of this court, and that the remand of the case to the Board of Tax Appeals leaves only ministerial acts to be performed by said Board and the Tax Commissioner of Ohio in accordance with this court's decision.

It is hereby ordered that this certificate which is concurred in by all of the Judges of the court, be made part of the record in this case.

Carl Weygandt, Chief Justice, 5/22/51.

[fol. 766]

[File endorsement omitted]

[Title omitted]

APPLICATION FOR SUBSTITUTION OF APPELLEES—Filed June 7, 1951

To: The Honorable Chief Justice and Judges of the Supreme Court of Ohio;

Your applicant, The Standard Oil Company, appellant in the above entitled cause, respectfully requests that John W. Peck, at present Tax Commissioner of Ohio, successor in office to C. Emory Glander, former Tax Commissioner of Ohio, be substituted as appellee in the place and stead of C. Emory Glander, Tax Commissioner, in the above entitled cause; and your applicant respectfully requests that John J. Carney, at present Auditor of Cuyahoga County, Ohio, successor in office to John A. Zangerle, former Auditor of Cuyahoga County, Ohio, be substituted, as appellee in the place and stead of John A. Zangerle, Auditor, in the above entitled cause.

The Standard Oil Company, By McAfee, Grossman, Taplin, Hanning; Newcomer & Hazlett, Its Attorneys.

Of Counsel: Isador Grossman, Rufus S. Day, Jr., H. V. E. Mitchell.

[fol. 767] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

NOTICE OF APPLICATION—Filed June 7, 1951

To: Robert Leach, Assistant Attorney General, Office of the Attorney General, State House Annex, Columbus 15, Ohio.
To: Frank T. Cullitan, Prosecuting Attorney for Cuyahoga County, Ohio, Criminal Courts Building, Cleveland 14, Ohio.

Please take notice that The Standard Oil Company, appellant in the above entitled cause, has deposited this day in the United States mails for delivery to the office of the Clerk of the Supreme Court of Ohio in due course of mail the above application for substitution of parties appellee in the above entitled cause and that the appellant will cause said application to be brought before the Honorable Chief Justice Carl V. Weygandt and the Supreme Court of Ohio at 2:00 o'clock p.m. on Thursday, June 7, 1951, or as soon thereafter as the Supreme Court may conveniently hear the same, in the Supreme Court of Ohio, State Capitol, Columbus, Ohio.

The Standard Oil Company. By McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett, Its Attorneys.

[fols. 768-770] PROOF OF SERVICE (omitted in printing)

[fol. 771] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed July 16, 1951

Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

Appellant designates the following portions of the record herein for printing by the Clerk of this Court:

1. Petition for Appeal from the Supreme Court of Ohio (Record, pages 1, 2).*
2. Order Allowing Appeal (Record, pages 3, 4).
[fol. 772]
3. Assignment of Errors and Prayer for Reversal (Record, pages 5, 6).
4. Proof of Service on John W. Peck, Tax Commissioner (Record, page 94).
5. Proof of Service on John J. Carney, Auditor of Cuyahoga County (Record, page 96).
6. Notice to Appellee, John J. Carney (Record, page 97).
7. Notice to Appellee, John W. Peck, Tax Commissioner (Record, page 98).
8. Precipe for Transcript of Record (Record, pages 101 to 103, inclusive).
9. Precipe for Transcript of Record with Acknowledgment of Service and Waiver of Right of Filing Counter-Precipe by Attorneys for John W. Peck, Tax Commissioner (Record, pages 104 to 106, inclusive).
10. Docket and Journal Entries of Supreme Court of Ohio (Record, pages 114 to 119, inclusive).
11. Notice of Appeal to Supreme Court of Ohio (Record, pages 120 to 172, inclusive).
12. From Volume I of the Record in the Supreme Court of Ohio entitled "Proceedings before the Board of Tax Appeals", only the following:
 - (a) Pages 18 to 37, inclusive, of such Volume (Record, pages 198 to 217, inclusive).
 - (b) Page 46 through page 48, line 15, of said Volume. (Record, pages 226 through 228, line 15).
 - (c) Page 52 through page 54, line 5, of said Volume (Record page 232 through page 234, line 5).
 - (d) Page 57, line 22, through page 94, of said Volume (Record, page 237, line 22, through page 274).

* References are to pages of the record as numbered in red by the Clerk of the Supreme Court of Ohio.

13. From Volume II of the Record in the Supreme Court of Ohio entitled "Proceedings before the Board of Tax Appeals" only the following:

(a) Pages 28 through 31 of said Volume (Record, pages 575 through 578).

[fol. 773] (b) Pages 103 through 106 of said volume (Record, pages 644 through 647).

(c) Appellant's Exhibit 1, page 109 of said Volume (Record, page 650).

(d) Appellant's Exhibit 2, page 111 of said Volume (Record, page 651).

14. Opinion of the Supreme Court of Ohio (Record, pages 738 to 760, inclusive).

15. Certificate of the Supreme Court of Ohio as to its intent to hold Sections 5328 and 5325, General Code of Ohio, to be valid and not repugnant to the Fourteenth Amendment of the Constitution of the United States (Record, pages 761, 762).

16. Application for Substitution of Appellees (Record, page 766).

17. Notice of Application (Record, page 767, 768).

Isador Grossman, Rufus S. Day, Jr., H. V. E. Mitchell, Attorneys for Appellant.

Proof of Service

Service on Appellees of Appellant's Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed is hereby acknowledged by the undersigned, Attorney for Appellees, this 11th day of July, 1951.

Isadore Topper, Attorney for Appellees.

[File endorsement omitted.]

[fol. 774] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1951

[Title omitted]

ORDER—Filed October 8, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

(8270)

